No. 98-727-CFX Title: Teresa L. Cunningham, Petitioner
v.
Hamilton County, Ohio

Docketed: November 4, 1998 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Nov 3 1998	Petition for writ of certiorari filed. (Response due December 23, 1998)
	Nov 17 1998	Order extending time to file response to petition until December 23, 1998.
	Dec 18 1998	Brief of respondent Hamilton County, Ohio in opposition filed.
	Dec 30 1998	DISTRIBUTED. January 15, 1999
	Jan 15 1999	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 25, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before Wednesday, March 24, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT April 19, 1999. **********
	Feb 25 1999	Brief of petitioner Teresa L. Cunningham filed.
	Feb 26 1999	Joint appendix filed.
	Mar 1 1999	Record filed.
	Mar 11 1999	Record filed.
	Mar 17 1999	CIRCULATED.
	Mar 24 1999	Brief of respondent Hamilton County filed.
	Apr 9 1999	Reply brief of petitioner Teresa Cunningham filed.
	Apr 19 1999	ARGUED.

Supreme Court, U.S.
FILED

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No. 98-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When may an attorney appeal a sanctions order: (i) not until final judgment (the rule in the Sixth and Tenth Circuits); (ii) immediately, *so long as* she is no longer participating in the case (the rule in the Fifth Circuit); (iii) immediately, *so long as* she is no longer participating *and* the appeal is not intertwined with the merits of the case (the rule in Third Circuit); (iv) immediately, *so long as* the sanction is "significant" (the rule in the Eleventh Circuit); or (v) immediately, without conditions (the rule in the Second, Seventh, Eighth, and Ninth Circuits, but rejected by the First, Fourth, and Federal Circuits)?

2. Given that the ruling below announced a new rule of appealability and deprived Petitioner of *any* appeal of the sanctions order against her, should the Sixth Circuit have followed the Tenth Circuit and applied its holding only prospectively?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Defendants-Appellees Correctional Medical Systems, Inc., Simon Leis, Sally Remilard, and Joseph Spriggs were parties to the proceedings below.

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No. 98-___

IN THE
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OCTOBER TERM, 1998

Teresa L. Cunningham,
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v.

Hamilton County, Ohio,
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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Teresa L. Cunningham respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The magistrate judge's opinions granting Respondent's motion for sanctions (Pet. App. 1a-2a) and setting the amount of sanctions (*id.* 3a-9a) are unreported. The district court's opinion affirming (*id.* 10a-18a) is unreported. The opinion of the Sixth Circuit motions panel deferring a decision on that court's jurisdiction over Petitioner's appeal (*id.* 19a-20a) is unreported. The Sixth Circuit's opinion dismissing Petitioner's appeal for lack of jurisdiction (*id.* 21a-37a) is reported at 144

F.3d 418. The Sixth Circuit's order denying rehearing and rehearing *en banc* (*id.* 38a) is unreported.

JURISDICTION

The Sixth Circuit entered its judgment on May 21, 1998. The Sixth Circuit denied rehearing and rehearing *en banc* on August 5, 1998. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).

STATUTE INVOLVED

28 USC 1291 provides in relevant part:

> The courts of appeals (other than the Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT

This Petition arises from sanctions imposed by a federal magistrate against Petitioner Teresa L. Cunningham, a solo practitioner in Florence, Kentucky. The Sixth Circuit dismissed Petitioner's interlocutory appeal of the sanctions order for lack of jurisdiction. Pet. App. 37a. Petitioner asks this Court to grant certiorari to resolve the substantial conflict in the circuits over when such a sanction order may be appealed. If the Court reverses the court of appeals' jurisdictional holding, the case then should be remanded to the Sixth Circuit to address the merits of Petitioner's challenge to the sanctions.

1. The bitterly fought suit underlying this Petition arose from the suicide death of a prisoner in the Hamilton County, Ohio jail. On behalf of the prisoner's father, Petitioner filed suit against Respondent Hamilton County and others under 42 USC 1983 alleging that the defendants were culpable in the death of the prisoner because of his known history of suicide attempts. The case was assigned to a magistrate judge, who entered a scheduling order. The defendants then served a

substantial number of interrogatories and requests for documents. Pet. App. 1a-2a.

As the Sixth Circuit recognized, Petitioner's "representation was fraught [with] difficulties even from the earliest days of this litigation." Pet. App. 22a. The defendants filed a series of motions to disqualify Petitioner on the ground that she was a potential witness in the case. In addition, Petitioner's client, the prisoner's father, died. A new administrator eventually was appointed for the estate, but the administrator lived several hours away and did not have a telephone. Pet. C.A. Br. 5, 6. As a result, Petitioner was unable to prepare full and complete responses to a number of the defendants' discovery requests. *Id.* Petitioner informed the defendants of this fact nine days after service of the requests, and some three weeks before the responses were due. Pet. App. 22a.

Counsel for the defendants took an exceptionally aggressive approach in response. The *first* business day after responses were due to the discovery requests, the defendants moved to compel. The magistrate held a hearing on the motion soon thereafter and, despite the death of Petitioner's client, entered an order compelling the production of "full and complete responses" within two days. The magistrate's order also provided that various depositions would take place on July 25 in Cincinnati, Ohio. Pet. App. 2a; Pet. C.A. Br. 14.

Petitioner, who remained unable to secure information from the estate's representative, nonetheless further investigated the facts of the case and responded to the defendants' discovery requests to the best of her abilities. Petitioner also informed Respondent's counsel of her need to depose one witness in advance, and that the witness would only agree to be deposed in Indianapolis, Indiana. Pet. C.A. Br. 14. Petitioner therefore noticed the deposition for that date and location. Pet. App. 4a.

Within three days, counsel for Respondent moved (i) to compel further discovery responses, (ii) for a protective order quashing the notice of deposition, and (iii) for an award of

attorney's fees and costs.[1] The magistrate held a hearing three days later and granted the motions, finding that Petitioner had "effectively violated" the court's earlier order. Pet. App. 2a. The parties then submitted briefs on the attorney's fees issue. Petitioner opposed an award of fees on the grounds that, *inter alia*, she had received the motion for fees and costs only immediately before the hearing, the hearing itself was held almost immediately upon the filing of the defendants' motions in violation of Petitioner's due process rights, the magistrate had provided an insufficient amount of time to prepare discovery responses, and the attorney's fees requested by the defendants were excessive. Pet. App. 7a. The magistrate rejected these objections and held that Respondent was "entitled to recover forthwith" $1494.00 in attorney's fees.[2] The magistrate refused to stay the fee award pending appeal because it perceived Petitioner's conduct to be "egregious." Pet. App. 7a.

2. Petitioner filed objections to the magistrate's order with the district court, which affirmed the sanctions order but did not share the magistrate's view that Petitioner's conduct had been "egregious." Instead, the district court explained that because Petitioner's "conduct clearly necessitated the motions to compel," attorney's fees were awarded under FRCP 37 "which is, essentially, self-executing in the event that a motion to compel is granted." Pet. App. 11a. Similarly, the district court found that amount of the award was not "clearly erroneous or contrary to law." *Id.* In a ruling that was unrelated to the issue of sanctions, the district court also granted the defendants' motion to disqualify Petitioner on the ground that she was a potential witness in the case. Tracking the language of the relevant Ohio rule, the court held that it

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[1]Counsel for the remaining defendants filed a parallel motion the next day. Pet. App. 4a.

[2]The court of appeals' opinion states that Respondent was awarded $1690.50 in fees (Pet. App. 25a), but that amount was reduced to $1494.00 by the magistrate (*id.* 9a). Petitioner separately has settled the magistrate's award of $2928.00 in attorney's fees to another defendant.

was "obvious that [Petitioner] ought to be called as a witness" in the case because she had participated in a conversation that was material to the disputes between the parties. *Id.* 16a. The district court denied the defendants' separate motion for additional sanctions. *Id.* 17a.

3. On Petitioner's appeal of the sanctions order, the defendants moved to dismiss for lack of appellate jurisdiction. A motions panel (Merritt, Contie, and Boggs, J.J.) denied the motion, explaining:

> There is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable. *Compare Appeal of Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distributors, Inc. v. Maico-Farhzeugfabrik*, 658 F.2d 944 (3d Cir. 1981); *Click v. Abilene National Bank*, 822 F.2d 544 (5th Cir. 1987); *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433 (10th Cir.), *cert. denied*, 117 S. Ct. 484 (1996); *G.J.B. & Assoc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Sanders Associates, Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed.Cir. 1993); *with Morely v. Ciba-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810 (11th Cir. 1992). In light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised.

Pet. App. 19a-20a.

The parties then submitted merits briefs. In its brief, Respondent "acknowledge[d] that, as this Court noted on page one of its within Order of February 4, 1997, '... There is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's

attorney is immediately appealable...(numerous citations omitted)...'" Resp. C.A. Br. at 13 (alterations in original). Respondent invited the court to "adopt the position of the Courts of Appeals which have held that such an interlocutory award (as well as an interlocutory award of sanctions levied pursuant to Fed. Civ. R. 37(a)(4)(A)) is *not* immediately appealable." Resp. C.A. Br. at 13-14 (emphasis in original).

In a divided opinion, the Sixth Circuit agreed with Respondent and dismissed Petitioner's appeal for lack of jurisdiction. The court analyzed the issue under the "collateral order" doctrine announced by this Court in *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), and reaffirmed in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). To qualify as an appealable "collateral order," an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

The very first sentence of Judge Boggs' opinion for the majority below recognized that the "appeal requires us to opine on an issue that has divided our sister circuits." Pet. App. 21a. Specifically,

> Five circuits have held that orders similar to the order at issue in this case (including orders imposing sanctions under Fed. R. Civ. P. 11, orders assessing attorney's fees under Fed. R. Civ. P. 37, and others) are so completely separate from the merits of the underlying action as to be immediately appealable by the attorney subject to the order. Five other circuits have come to the opposite conclusion.

Id. 28a (citations omitted). Moreover, Judge Boggs acknowledged,

> Of the five circuits (First, Third, Fifth, Tenth, and Federal) that refuse to permit a participating attorney to file an immediate appeal under the collateral order doctrine, two [the Third and Fifth] have held nevertheless that an attorney who has withdrawn from representation in the underlying case is entitled to an immediate appeal. By contrast, one of these circuits [the Tenth] has specifically reached the opposite conclusion.

Id. 30a (citations omitted).

Adopting the view of the Tenth Circuit, the majority below concluded that attorney sanctions orders are never appealable before final judgment. The court recognized that "[i]t is beyond dispute that the first *Cohen* factor [that the order finally determine the issue] is satisfied here." Pet. App. 28a. Regarding the second factor, however, the majority concluded that appeals of attorney sanctions orders are not separate from the merits because they require an evaluation of the discovery responses submitted by the attorney. According to the majority, that "process would differ only slightly from an inquiry into the merits." *Id.* 29a.

The majority also rejected the view of the Third and Fifth Circuits that an appeal is permitted so long as the attorney no longer is participating in the case. The majority believed that it would be "strange" to permit an attorney to appeal a sanction immediately when this Court has held that an attorney may not immediately appeal an order of disqualification. Pet. App. 30a (citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985)). In addition, the majority foresaw "serious administrative problems" with determining whether an appeal should run from the sanctions order or instead from the date of the attorney's withdrawal or removal from the case. Pet. App. 31a. Finally, the majority announced that it would have allowed Petitioner to appeal from a final judgment in the case, although it recognized that Petitioner had not in fact filed such an appeal and therefore would never have the opportunity to contest the sanctions order against her. *Id.* 28a n.6.

In dissent, Judge Moore would have adopted the view of five circuits that an attorney may immediately appeal a sanctions order. Judge Moore explained that Petitioner's appeal is not, in fact, intertwined with the merits of the underlying lawsuit:

> Cunningham does not contend that her failure to answer the discovery turned on the relevance or scope of the discovery, or that her answers were true where the district court found them to be false. . . . Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments involve the substance of the discovery itself.

Pet. App. 34a. Alternatively, Judge Moore believed that the majority's holding should apply only prospectively:

> Because Cunningham did not file a notice of appeal upon the termination of the underlying litigation, retroactive application of the majority decision effectively bars any review of the district court's sanctions imposed upon her. The inequity of this result is patently obvious. When faced with a similar situation, the Tenth Circuit in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990), refused to impose such an unfair result, explaining that ["]the sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible, to foretell.["]

Pet. App. 37a.

4. The Sixth Circuit subsequently denied rehearing and rehearing *en banc*. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Frequently Recurring Questions Presented By This Case Have Deeply Divided The Circuits.

The circuits have adopted *six* different rules regarding the circumstances in which an attorney may immediately appeal

the imposition of sanctions. Despite the large number of cases in which the issue arises, this Court has not previously had the opportunity to resolve this now fully mature conflict.[3] Moreover, as is apparent from the large number of appellate cases addressing the question, the issue is important and frequently recurring and therefore deserves the Court's attention.

Separately, on November 9, 1998, counsel in this case will petition for certiorari in a case that presents the Court with the opportunity to resolve another substantial division in the circuits over application of the *Cohen* doctrine: whether a *pro se* Title VII plaintiff may immediately appeal an order refusing to appoint counsel. *Ficken v. Alvarez*, 146 F.3d 978 (D.C. Cir. 1998) (denying interlocutory appeal; acknowledging that "[t]he question has divided our sister circuits. The Third, Fifth, Eighth, and Ninth Circuits allow interlocutory appeals of such orders. The Sixth, Seventh, and Eleventh Circuits read the *Cohen/Coopers & Lybrand* factors to reach the opposite conclusion." (citations omitted)). Our view is that certiorari should be granted in both this case and in *Ficken* in order to resolve the specific conflicts they present, and also to bring greater certainty to the "collateral order" doctrine generally. *See generally Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986) (Posner, J.) (suggesting the need to reconceptualize the *Cohen* doctrine).

1. Four circuits apply a *per se* rule permitting appeals. The Second, Seventh, Eighth, and Ninth Circuits all have held conclusively that an attorney may immediately appeal the imposition of sanctions. *See Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990) ("Although not raised by

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[3]The issue was presented by the Petition for Certiorari in No. 97-323, *Ted Lapidus, S.A. v. Vann* (cited *infra* n.4), but that case was mooted during the pendency of the Petition. *See* BIO, No. 97-323. The issue was not presented by the Petitions in (i) *Serritella v. Markum*, 119 F.3d 506 (7th Cir.), *cert. denied sub nom.* No. 97-732, *Steagall v. U.S. District Court* (cited *infra* n.6), (ii) *Howard v. Mail-Well Envel. Co.*, 90 F.3d 433 (10th Cir.), *cert. denied sub nom.* No. 96-571, *Smith v. Mail-Well Envel. Co.* (cited *supra* at 5), (iii) or No. 95-808, *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1130 (9th Cir.) (cited *infra* n.5).

appellees, we note in general that Rule 11 sanctions against present counsel to a party are immediately appealable as a final decision under § 1291 and under the *Cohen* collateral order doctrine." (citations omitted)); *Hoar v. Sara Lee Corp.*, 882 F.2d 682, 685 (2d Cir. 1989) ("[A] non-party attorney may bring an interlocutory appeal of a Rule 37 sanction pursuant to the *Cohen* exception.")[4]; *Aetna Life Ins. Co. v. Alla Med. Servs.*, 855 F.2d 1470, 1472 (9th Cir. 1988) ("Aetna acknowledges that this court has previously found orders imposing sanctions against non-party attorneys to be immediately appealable.")[5]; *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985).[6]

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[4]*See also Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95 (2d Cir.) (acknowledging "a number of decisions in this circuit broadly authorizing a non-party attorney to bring an immediate appeal from an award of sanctions"), *cert. denied*, 118 S. Ct. 337 (1997); *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3, 5 (2d Cir. 1996); *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253, 1258 n.4 (2d Cir. 1996); *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21, 22 n.1 (2d Cir. 1995) ("A Rule 11 order against an attorney, though not a final judgment, is appealable under the collateral order doctrine."); *Discon, Inc. v. NYNEX Corp.*, 4 F.3d 130, 132 (2d Cir. 1993) ("[A]s a final collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a sanction award may be appealed separately from the merits of the underlying action."); *Sanko Steamship Co. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987); *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983).

[5]*See also Hill v. Macmillan/McGraw-Hill Sch. Co.*, 102 F.3d 422, 424 (9th Cir. 1996) ("We ha[ve] previously held that [a sanctions] order which imposes liability only on a non-party is immediately appealable as a final order, whereas an order that runs only to the party is not."); *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) ("An order imposing Rule 11 sanctions upon counsel, a nonparty, is final and appealable by the attorney sanctioned upon the imposition of the sanction."), *cert. denied*, 516 U.S. 1145 (1996); *Telluride Mgmt. Solutions v. Telluride Invest. Group*, 55 F.3d 463, 465 (9th Cir. 1995) ("An order compelling a nonparty to pay attorney's fees and costs is a final order reviewable under 28 U.S.C. § 1291."); *Mark Indus. v. Sea Captain's Choice*, 50 F.3d 730, 731 (9th Cir. 1995); *Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1275 (9th Cir. 1990) ("[A]n order imposing sanctions solely on a nonparty falls within the collateral order exception to the final judgment rule and thus is immediately appealable."); *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990) ("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); *Rachel v. Banana Republic*, 831 F.2d 1503, 1508 n.5 (9th Cir. 1987) ("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon

These precedents are deeply embedded, as is apparent from the cases cited in the footnotes to the previous paragraph. In fact, these courts have continued to apply their precedents while recognizing the conflicting views of other circuits. Thus, the Second Circuit recently "recognize[d] that some other circuits do not agree and have denied an immediate appeal in this situation principally because sanctioned counsel would have a right to appeal later and because the sanction order 'may

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imposition of the sanction."); *Unioil v. E.F. Hutton & Co.*, 809 F.2d 548, 552 (9th Cir. 1986), *cert. denied*, 484 U.S. 822, 823 (1987); *Optyl Eyewear Fashion Int'l Corp. v. Style Companies*, 760 F.2d 1045, 1047 n.1 (9th Cir. 1985) ("An order imposing a sanction upon counsel, a nonparty in the underlying action, is final and appealable by the person sanctioned, when the sanction is imposed."); *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 747 F.2d 1303, 1305 (9th Cir. 1984) ("Ordinarily, a nonparty may appeal either a contempt order or a discovery sanction before final judgment in the underlying action if the order or sanction is directed at him."), *cert. denied*, 471 U.S. 1100 (1985); *Kordich v. Marine Clerks Ass'n*, 715 F.2d 1392, 1392 (9th Cir. 1983) ("Appellant contends that an order compelling a non-party to pay attorneys fees and costs is immediately appealable as a final order. We agree."); *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983); *Mesirow v. Pepperidge Farm*, 703 F.2d 339, 345 (9th Cir.) ("An order imposing a sanction upon counsel, a nonparty, is final and appealable by the person sanctioned, when imposed."), *cert. denied*, 464 U.S. 820 (1983); *Liew v. Breen*, 640 F.2d 1046, 1048 (9th Cir. 1981) ("An order compelling a non-party such as Breen to pay attorney's fees and expenses is a final order reviewable under 28 U.S.C. § 1291 (1976)."); *David v. Hooker*, 560 F.2d 412, 417 (9th Cir. 1977) ("Thus, the order requiring Haffkine to pay the attorney's fees and expenses [under Rule 37] incurred by the failure to answer is appealable as it is final as to a nonparty.").

[6]*See also Serritella v. Markum*, 119 F.3d 506, 512 (7th Cir.) ("In this Circuit, an order imposing Rule 11 sanctions against an attorney for a party who has participated in pending litigation is immediately appealable. The Second, Eighth, Ninth and Eleventh Circuits are in accord." (citations omitted)), *cert. denied*, 118 S. Ct. 566 (1997); *Cleveland Hair Clinic v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997) ("[A]n attorney no longer involved in the litigation may appeal immediately from an award of sanctions, because he will not be able to appeal from the order terminating the litigation on the merits."); *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1183 (7th Cir. 1992); *Cassidy v. Cassidy*, 950 F.2d 381, 383 (7th Cir. 1991) ("We have used *Cohen* to assume jurisdiction of appeals from orders awarding attorneys' fees and other sanctions, observing that the award is independent of the merits and the transfer of funds poses a risk that a party prevailing at the end of the case will be unable to recoup the money."); *John v. Barron*, 897 F.2d 1387, 1390 (7th Cir.), *cert. denied*, 498 U.S. 821 (1990); *Knorr Brake Corp. v. Harbil*, 738 F.2d 223, 226 (7th Cir. 1984) ("Other circuits have held that an order assessing fees under section 1927 is appealable when entered. We agree." (citations omitted)).

not be entirely separable from the underlying case.'" *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95 (2d Cir.), *cert. denied*, 118 S. Ct. 337 (1997). Judge Easterbrook similarly has recognized that the Seventh Circuit's rule "that an attorney no longer involved in the litigation may appeal immediately from an award of sanctions, because he will not be able to appeal from the order terminating the litigation on the merits . . . . although questioned and disapproved in other circuits remains the law of this one." *Cleveland Hair Clinic v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997). A panel of the Ninth Circuit has made the same point even more forcefully:

> [Appellee] argues that we should reexamine our approach given the increasing frequency with which sanctions are being imposed, and in light of Supreme Court authority narrowing the reach of the collateral order doctrine. Our prior holding that sanction orders issued solely against non-party attorneys are immediately appealable is controlling absent overruling by the Supreme Court or an *en banc* panel. We note that our holding that Rule 11 sanctions against non-party attorneys are immediately appealable has been reaffirmed subsequent to the Supreme Court's most recent pronouncement in 1985 of the appealability of rulings on motions to disqualify attorneys. Absent overruling, we must follow the law of this Circuit.

Aetna Life Ins. Co. v. Alla Med. Servs., 855 F.2d 1470, 1472-73 (9th Cir. 1988).

2. The Eleventh Circuit permits immediate appeals of "significant" sanctions. The Eleventh Circuit has adopted virtually the same rule as the Second, Seventh, Eighth, and Ninth Circuits, except that the Eleventh Circuit has specified that the sanction in question must be "significant" and not "nominal." *Ortho Pharm. Corp. v. Sona Distribs.*, 847 F.2d 1512, 1515-16 (11th Cir. 1988) ("When a Rule 11 sanction[] directs a non-party (jointly and severally with parties to the action or alone) to pay immediately–that is, before entry of

financial judgment–significant attorneys fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."); *see also DeSisto College v. Line*, 888 F.2d 755, 762 n.12 (11th Cir. 1989) (reiterating that "the size of the sanction was an important factor" in permitting an appeal). The rationale of the Eleventh Circuit is that "[w]hile the issue may be separable and discrete from the central controversy of the case, the small size of the sanction will not meet the 'significant issue' component of the second criterion under *Cohen*." *Ortho Pharm. Corp.*, 847 F.2d at 1516. The Eleventh Circuit's precedents permitting an immediate appeal are similarly deeply embedded,[7] and that court has recognized that other circuits apply a contrary rule. *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 n.3 (11th Cir. 1992) ("Some circuits even prohibit immediate appeals by non-parties." (citing *G.J.B.*, *supra* (10th Cir.); *Click*, *supra* (5th Cir.); *Licht & Semenoff*, *supra* (1st Cir.)); *Ortho Pharm. Corp.*, 847 F.2d at 1516 ("Courts that have confronted the question of whether a non-party may take immediate appeal of a sanction order have parted ways in their application of the third *Cohen* criterion to this sort of situation.").

3. The Fifth Circuit permits immediate appeals if the attorney is no longer participating in the case. The Fifth Circuit held in *Click v. Abilene Nat'l Bank*, 822 F.2d 544 (5th Cir. 1987), that an attorney generally may *not* immediately appeal the imposition of sanctions. *See also Shaffer v. Iron Cloud, Inc.*, 865 F.2d 690, 691 (5th Cir. 1989). That court has recognized an exception, however, when (as in this case) the

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[7] *See also Peterson v. BMI Refractories*, 124 F.3d 1386, 1390 (11th Cir. 1997) ("We have jurisdiction under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), to review the district court's imposition of sanctions against plaintiffs' counsel."); *Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber*, 890 F.2d 371, 378 (11th Cir. 1989) ("Ruden Barnett correctly asserts that we have applied the collateral order doctrine to cases in which a non-party was sanctioned by the trial court in a non-final order."); *Robinson v. Tanner*, 798 F.2d 1378, 1381 (11th Cir. 1986) ("By following this procedure, the courts have found discovery sanction orders immediately appealable where . . . the sanction was against a non-party who might not be able to obtain review from a final judgment . . . ." (citations omitted)), *cert. denied*, 481 U.S. 1039 (1987).

attorney no longer is participating in the district court proceedings. "[W]e believe that where an order assesses sanctions against an attorney who has withdrawn from representation at the time of the appeal, and immediate appeal of the sanctions order will not impede the progress of the underlying litigation, an exception to the general policy set out in *Click* is warranted." *Markwell v. County of Bexar*, 878 F.2d 889, 901 (5th Cir. 1989). The Fifth Circuit has applied that rule in subsequent cases,[8] and has recognized that

> [t]here is disagreement in the circuits . . . . The First, Third and Federal Circuits also hold that an appeal of a sanction order issued against an attorney for a party is not an appealable collateral order under *Cohen*. However, the Second, Seventh, Eighth, and Eleventh Circuits hold that an attorney for a party may immediately appeal a sanction order pursuant to *Cohen*.

Chaves v. M/V Medina Star, 47 F.3d 153, 155 n.7 (5th Cir. 1995) (citations omitted).

4. The Third Circuit permits immediate appeals if the attorney is no longer participating in the case *and* the appeal is not intertwined with the merits. Like the Fifth Circuit, the Third Circuit does not permit immediate appeals unless the attorney no longer is participating in the case. *Compare Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944 (3d Cir. 1981) (no appeal permitted) *with Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985) (appeal permitted where counsel had

[8] *Walker v. Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997) ("The record reflects that Peebles no longer is counsel in this action . . . . Consequently, Peebles need not defer until the end of this litigation to appeal the district court's finding that he abused his duty of candor."); *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995) ("We believe that the facts of the instant case fall within the exception set out in *Markwell*. While attorney Spears has not withdrawn from representation of his clients, his clients have settled and have been voluntarily dismissed from the underlying action.").

withdrawn).[9] But the Third Circuit has applied a further refinement: that court conducts a "case-by-case" analysis into whether the appeal "touch[es] on the merits of the underlying case." *In re Tutu Wells Contamination Litigation*, 120 F.3d 368, 378 n.7 (3d Cir. 1997). Thus, although "sanctions for violations of discovery orders are *usually* considered interlocutory and not immediately appealable" because of their fact-specific nature, *Eavensen, supra*, 775 F.2d at 538 n.6 (emphasis added), the Third Circuit has twice permitted non-participating attorneys to bring due process challenges to discovery sanctions, *In re Tutu Wells, supra*, 120 F.3d 368; *Martin v. Brown*, 63 F.3d 1252, 1261 n.11 (3d Cir. 1995) ("As in *Eavenson*, 'we do not now adopt a rule that would allow immediate appellate review of any sanction order imposed upon counsel, whether counsel has withdrawn from the case or not.'").

5. Three circuits generally do not permit immediate appeals, but have not addressed appeals by attorneys that are no longer participating in the case. The First, Fourth, and Federal Circuits have refused to permit immediate appeals of sanction orders, but have not been presented with a case in which the appealing attorney no longer was participating in the case. *Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993)[10]; *In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986) (not permitting appeal, but "express[ing] no opinion as to the appealability of sanctions against a nonparty or an attorney no longer litigating the case"); *In re Underwriters at Lloyd's & British Ins. Cos.*, 666 F.2d 55, 57 (4th Cir. 1981) (citing *Wheeler v. Anchor Continental, Inc.*,

[9] *See also Glaser v. Cincinnati Milacron*, 808 F.2d 285, 286 (3d Cir. 1986) ("Because appellants are no longer counsel for the plaintiff, we have appellate jurisdiction under *Eavenson* . . . ."; appeal permitted over whether legal theory set forth in pleading was filed in good faith).

[10] *See also View Engineering v. Robotic Vision Sys.*, 115 F.3d 962, 964 (Fed. Cir. 1997) ("[A] sanction against an attorney is not reviewable until final judgment is entered on the underlying action, even though the amount of that sanction has already been determined.").

622 F.2d 94 (4th Cir. 1980)). For its part, the Federal Circuit has recognized the "disagreement among the circuits on whether an attorney for a party may appeal a sanction order issued against the attorney alone or against the attorney and the party together." *Sanders*, 2 F.3d at 395-96 (collecting cases).

6. The Tenth Circuit does not permit immediate appeals *even if* the attorney is no longer participating in the case, but has applied that rule only prospectively. The Tenth Circuit does not permit immediate appeals of sanction orders, without regard to whether the attorney remains in the case. Thus, that court has squarely "disagree[d] with the rationales underlying the decisions of the Third, Fifth and Seventh Circuits holding a sanction order against an attorney who no longer represents a party in the litigation is appealable under the collateral order doctrine." *Howard v. Mail-Well Envel. Co.*, 90 F.3d 433, 436 (10th Cir. 1996).[11] But the Tenth Circuit applied its rule only prospectively. In the first case presenting the question, the court recognized that the attorney before it had filed an interlocutory appeal from the sanctions order but had not appealed from the final judgment subsequently entered by the district court. As a result, retroactive application of the court's ruling "would be inequitable" because it would leave the attorney "remediless for the time has passed to file a new notice of appeal from the final judgment" and because "[t]he sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible to foretell." *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829-30 (10th Cir. 1990). Moreover, like virtually every court of appeals, the Tenth Circuit has recognized that

> [d]espite their general agreement on the interlocutory nature of a sanction order against counsel of record, the circuit courts are sharply

[11] *See also Law v. NCAA*, 134 F.3d 1025, 1029 (10th Cir. 1998) ("As a general rule, an order imposing sanctions is not immediately appealable."); *D&H Marketers v. Freedom Oil & Gas*, 744 F.2d 1443 (10th Cir. 1984) (en banc).

> divided on the question of whether such an order is immediately appealable as an exception to the 'final decision' rule under the collateral order doctrine first announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) . . . .

Id. at 827.

7. The Sixth Circuit in this case refused to permit immediate appeals even though Petitioner no longer is participating in the case, and furthermore applied its ruling retroactively. The Sixth Circuit's decision conflicts with *every* court of appeals that has addressed facts that parallel this case. The Sixth Circuit expressly adopted the view of the First, Third, Fourth, Fifth, Tenth, and Federal Circuits that attorney sanction orders generally are not immediately appealable, and rejected the contrary view of the Second, Seventh, Eighth, and Ninth Circuits. Pet. App. 28a-30a. In this respect, the decision below also conflicts with the Eleventh Circuit's unique holding that only "significant" sanctions are appealable, because the $1400 sanction in this case is "significant" and not "nominal." The decision below further refuses to follow not just those five circuits that generally permit immediate appeals of sanction orders but also the Third and Fifth Circuits, which permit appeals so long as the attorney has withdrawn or been removed; only the Tenth Circuit agrees that no appeal is permissible in this circumstance. Pet. App. 30a. Finally, the decision below openly conflicts with even the Tenth Circuit, which applied its appealability holding only prospectively in order to avoid depriving the attorney before it of any opportunity to appeal.

This Court ought to grant certiorari in order to resolve these important and recurring conflicts in the circuits.

II. The Decision Below Is Erroneous.

1. Attorney sanctions awards are immediately appealable collateral orders. Certiorari also is warranted because the decision below errs in its application of the collateral order

doctrine. To qualify as a final collateral order, an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). As to the first element, there is no question that the sanction order in this case finally determined the issue, and Respondent has never contended otherwise.

As to the second element, the award of sanctions against an attorney is completely separate from the merits of a case. A trial judge's decision to sanction an attorney depends upon the behavior of the attorney and not upon the merits of the parties' claims. Thus, as Judge Moore noted in dissent, "None of [Petitioner's] arguments against the sanctions order involve the substance of the discovery itself. . . . Consequently . . . resolution of [Petitioner's] . . . objections to the sanctions order would not compel us to address the merits of the underlying action." Pet. App. 34a. Nor would such an appeal delay the litigation (which can proceed without interruption) or result in unnecessary or duplicative appeals. Unlike attorney-disqualification orders, which may or may not ultimately be appealed depending on which party finally prevails, sanctions orders are unaffected by the final disposition of the case and therefore inevitably will be appealed.[12]

In a closely analogous circumstance, this Court has held that nonparty civil contempt sanctions are separable from the merits and thus immediately appealable. *See United States Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the

[12]Indeed, an appeal of the sanction could be rendered unnecessary only by a settlement agreement that also includes a resolution of the sanction. This possibility, as discussed below, creates a potential conflict of interest between attorney and client, which would be obviated by allowing an immediate appeal.

underlying action."); *United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328 (1940). Indeed, the *Ryan* decision specifically instructs that the proper remedy for a nonparty aggrieved by a discovery order is to disobey the order, incur contempt citations, and then immediately appeal the contempt citation. 402 U.S. at 532. Sanctions and contempt citations are functionally indistinguishable in that both seek to deter and punish the violation of an obligation owed to the court as well as to compensate aggrieved parties. *Accord Hutto v. Finney*, 437 U.S. 678, 692 n.17 (1978) (noting the compensatory and coercive functions of civil contempt orders); *Cheng v. GAF Corp.*, 713 F.2d at 890 (citing Advisory Committee Note of 1990 to Amended Rule 37)).

As for the third *Cohen* factor, sanctions awards against attorneys are effectively unreviewable on appeal. In cases in which the attorney's client wins or settles the case, several circuits have held that the attorney may not appeal from any judgment entered in the case.[13] *E.g.*, *Cheng v. GAF Corp.*, 713 F.2d at 890 (2d Cir.); *Frazier v. Cast*, 771 F.2d at 261 (7th Cir.). Courts have, in fact, gone so far as to hold that, as with a civil contempt order, a non-party attorney is completely precluded from contesting a sanction on appeal from a final judgment. *E.g.*, *Hoar, Inc. v. Sara Lee, Inc.*, 882 F.2d at 685 (2d Cir.); *David v. Hooker, Ltd.*, 560 F.2d at 417 (9th Cir.). Moreover, the sanctions award may be effectively unreviewable on appeal for the simple reason that the party who obtained the award may be insolvent by the time of an appeal after final judgment. For these reasons, the decision below gives a sanctioned attorney a substantial incentive to not settle or to manipulate the settlement to resolve the sanction, and thereby risks causing substantial harm to the attorney-client relationship.

[13] Although many cases do not settle or result in a favorable final judgment for the sanctioned attorney's client, the attorney cannot know at the time of the sanction how the case will conclude. The attorney therefore has no option but to appeal immediately in order to preserve her opportunity to appeal.

2. Attorney sanctions awards are immediately appealable when the sanctioned attorney no longer is participating in the case. Even if the Sixth Circuit were correct that sanctions orders are not *per se* immediately appealable, it erred in holding that no appeal is permitted even when (as here) the attorney no longer is involved in the case. An appeal by a non-participating attorney is indistinguishable from an appeal by a non-party who has been sanctioned for contempt. Such an appeal by definition cannot interfere with any ongoing district court proceedings. There is, moreover, an even greater concern that the non-participating attorney would lack standing to bring an appeal at the end of the case. Finally, an attorney in such a position even by the exercise of reasonable diligence may not discover that the litigation has terminated (as when the case settles confidentially or lies dormant on the district court's docket for a lengthy period of time) and therefore may miss her opportunity to appeal.

Contrary to the analysis of the majority below (Pet. App. 30a), attorney sanctions cannot be analogized to orders disqualifying counsel, which are not immediately appealable. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985). Appeals of disqualification orders directly affect the ongoing district court litigation: "When an appellate court accepts jurisdiction of an order disqualifying counsel, the practical effect is to delay proceedings on the merits until the appeal is decided." *Id.* at 434. In addition, a party whose counsel has been disqualified will always have an effective opportunity for review. *Id.* at 438. Neither of those considerations holds true for immediate appeals of sanctions orders.

Nor was the majority below correct that a rule permitting appeals by non-participating attorneys would result in "administrative difficulties" in determining when the attorney's time for filing an appeal begins. Pet. App. 31a. Because such a rule of appealability would depend on both (i) the entry of a

sanctions order and (ii) the attorney's withdrawal or removal, the filing period should run from the later of those two dates.[14]

3. Even if the court of appeals correctly held that attorney sanctions are not immediately appealable, it erred in applying its holding retroactively. This Court held in *Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971), that the determination whether a court ruling applies retroactively turns on whether (1) the decision establishes a new principle of law the resolution of which was not clearly foreshadowed, (2) the decision's purpose would be retarded by its retroactive application, and (3) the decision's retroactive application would produce inequitable results. In this case, the Sixth Circuit erred in applying its decision retroactively. The decision below was not foreshadowed by prior Sixth Circuit precedent and openly conflicts with decisions of seven circuits. Moreover, this Court's civil contempt jurisprudence strongly suggested that Petitioner could immediately appeal the sanctions order. Petitioner therefore understandably did not appeal from the district court's entry of final judgment, and as a result has been deprived of *any* opportunity to appeal. As the Tenth Circuit recognized in an indistinguishable case, "the small benefit [gained] by applying [such a] holding retroactively does not outweigh the inequity which would result from such a determination." *G.J.B. & Associates, Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990).

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[14]In this case, those events occurred on the same day. Pet. App. 10a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN LEE STARCHER,
Plaintiff

vs

Case No. C-1-95-815
(Beckwith, J.)

MEDICAL CORRECTIONS
SYSTEMS, INC. et. al
Defendants

ORDER

This matter is before the Court on plaintiff Darwin Lee Starcher's motion to compel and for sanctions (Doc. 28), defendant Hamilton County, Ohio's second motion for protective order and for sanctions (Doc. 30), defendants Medical Correction Systems (CMS), Remilard, and Spriggs' motions for protective order and to enforce (Docs. 31, 32) and defendants' joint motion to quash (Doc. 34). This Court held a hearing on these motions on July 19, 1996. After reviewing the record and hearing arguments by the parties, the Court hereby ORDERS the following:

1) that the plaintiff's motion to compel and for sanction (Doc. 28) is DENIED;
2) that defendant Hamilton County's motion for protective order prohibiting the deposition of Rex Smith noticed for July 22, 1996 in Indianapolis, Indiana (Doc. 30) is GRANTED such that the deposition will not go forward;
3) that defendants CMS, Spriggs, and Remilard's motion for protective order to prohibit Rex Smith's deposition notice for July 22, 1996 in Indianapolis, Indiana (Doc. 31) is GRANTED

and their motion for protective order to prohibit the depositions of Spriggs and Remilard noticed for July 25, 1996 is GRANTED;

4) that defendants CMS, Spriggs, and Remilard's motion to compel full and complete responses to defendants' first set of interrogatories and request for documents (Doc. 32) is GRANTED; and
5) that defendants' joint motion to quash the subpoena requiring Rex Smith to appear for deposition on July 22, 1996 in Indianapolis, Indiana (Doc. 34) is GRANTED.

Plaintiff is FURTHER ORDERED to serve supplementary answers to defendants' first set of interrogatories and request for documents WITHIN TEN DAYS of the date of the hearing on this matter.

The depositions of defendants Remilard and Spriggs shall go forward no sooner than THIRTEEN days after plaintiff has served defendants with the above-ordered supplementary response. The depositions of defendants Spriggs and Remilard are to be scheduled by agreement of the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure. The deposition of Rex Smith may go forward on a date and in a place agreed upon by the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure.

Because the Court finds that plaintiff has effectively violated this Court's order of July 12, 1996, defendants' motions for sanctions are GRANTED. Within THIRTY DAYS counsel for defendants are to submit to the Court appropriate statements indicating their reasonable fees and expenses for their court appearance on these motions and their preparation for today's hearing. Defendants shall serve copies of these statements on plaintiff. The Court will consider these statements before ruling upon the sanctions to be imposed.

SO ORDERED.

Date: _____

James F. Cook
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN LEE STARCHER,
Plaintiff

vs Case No. C-1-95-815

MEDICAL CORRECTIONS
SYSTEMS, INC. et. al
Defendants J. Beckwith

ORDER

This Order addresses the imposition of sanctions in the form of reasonable expenses, including attorney's fees, to be imposed against plaintiffs' counsel in regard to the hearing that was conducted before the undersigned on July 19, 1996. In this ruling the Court will determine the amount of such expenses to which defendants are entitled. A review of the record leading up to the July 19th hearing is appropriate.

An informal discovery conference was held by the undersigned with all counsel on July 10, 1996 and resulted in the entry of a formal order dated July 11, 1996 and entered on July 12, 1996. (Doc. 26). This order directed *inter alia*, that the plaintiff make full and complete responses to defendants' First Set of Interrogatories and Document Requests by 4:00 p.m. on July 12, 1996; that certain depositions, including that of Rex Smith, be taken on July 25, 1996; and that the depositions of defendants Remillard and Spriggs go forward on July 25, 1996 only if plaintiff had made full and complete responses to defendants' First Set of Interrogatories and Document Requests by 4:00 p.m. on July 12, 1996. It should be noted that

plaintiff's counsel was advised of and understood the July 12th , 4:00 p.m. deadline at the conference on July 10th.

On July 16, 1996, plaintiff filed a Motion to Compel Defendants Spriggs and Remillard to Appear for Depositions on July 25, 1996, to Depose Rex Smith in Indianapolis, Indiana and for Sanctions. (Doc. 28). It is argued int his motion that plaintiff complied with the July 12th, 4:00 p.m. deadline on responses to the defendants' Interrogatories and Requests for Production of Documents, yet defendants Spriggs and Remillard, by their attorney, have stated that they will not appear for their depositions; and that Rex Smith was located in Indianapolis and that he would be unavailable for his deposition in Cincinnati on July 25th, that his deposition and, therefore, been resche[illegible]ed by plaintiff's counsel for July 22nd in Indianapolis and a subpoe[illegible]ssued by plaintiff's counsel to that effect. Sanctions against defe[illegible]nts Spriggs and Remillard were sought for their alleged failure to obey the July 12th order.

A Notice to Take Deposition was issued by plaintiff's counsel on July 15th noticing the deposition of Rex smith in Indianapolis on July 22nd. (Doc. 29).

On July 16, 1996 the County Defendants filed a Second Motion for Protective Order and for Expenses, Fees and Sanctions. (Doc. 30). The grounds for the motion are that the action of plaintiff's counsel in scheduling the Smith deposition in Indianapolis on July 22nd was a violation of the Court's July 12th order which directed that the deposition be taken on July 25th, that it was the clear understanding of all counsel that the deposition would be taken on that date in plaintiff's counsel's office in Cincinnati. Also, it was alleged that the subpoena issued to Smith was not valid in that it was issued out of this court rather than the U.S. District court in Indianapolis. Expenses including attorney's fees were requested pursuant to F.R. Civ. P. 26(c) and 37(a)(4).

The CMS, Remillard and Spriggs Defendants also filed a Motion for Protective Order and Sanctions. (Doc. 31). This motion was filed on July 17, 1996 and sought a protective order prohibiting the taking of the Smith deposition on July 22nd and the taking of the Remillard and Spriggs depositions on July 25th. The grounds for the motion are that the unilateral action of plaintiff's counsel in noticing the Smith deposition for July 22nd in Indianapolis violated the Court's July 12th order, and that plaintiff's responses to the First Set of Interrogatories and Document Requests were not full and

complete in violation of the July 12th order so that the depositions of Remillard and Sprigs should not go forward on July 25th. The legal expenses and costs of these defendants incurred in bringing the motion were sought.

Also on July 17, 1996 the CMS Defendants filed a Motion to Enforce Order and for Sanctions. (Doc. 32). By this motion these defendants asked for an order compelling compliance with the July 12th order relating to plaintiff's responses to the defendants' Interrogatories and Document Requests and for reasonable expenses, including attorneys' fees in obtaining such order.

All defendants filed a joint motion on July 17, 1996 to quash the subpoena issued to Rex Smith for his deposition on July 22nd in Indianapolis (doc. 34), basically on the same grounds as set forth in the other motions filed in connection therewith.

The defendants, respectively, filed responses to the plaintiff's Motion to Compel which is noted above. (doc. 35 and 36).

In view of the apparent urgency of these motions the Court scheduled them for hearing on July 19, 1996 and did conduct such hearing on that date. All counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record. (Doc. 47).

The undersigned made the following rulings on the motions; the plaintiff's Motion to Compel was denied; the motion of the County Defendants for a protective order prohibiting the deposition of Rex Smith at Indianapolis on July 22nd was granted; the motion of the CMS Defendants was also granted in that respect and prohibiting the taking of the depositions of defendants Remillard and Sprigs on July 25th; the motion of the CMS Defendants and Remillard and Spriggs requiring plaintiff to serve full and complete answers to the defendants' First Set of Interrogatories and Request for Documents was granted as was the defendants' joint motion to quash the Smith subpoena.

Further directives for the serving of supplemental responses by plaintiff to the interrogatories and document requests were included in the order, as well as for the taking of the depositions of defendants Remillard and Spriggs and the witness Rex Smith.

The Court concluded that plaintiff's counsel had not complied with the July 125th order, but had violated same. The motions of the defendants for protective order and sanctions were granted and

counsel were directed to submit to the Court their respective statements of charges and costs that were necessitated by filing their motions and attending the hearing. (Doc. 38 and 47).

The authority for the action taken by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants; motions for protective orders were granted after a hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

The CMS, Remillard and Spriggs defendants have filed a Memorandum and Statement Supporting Amount Sought in Sanctions. (Doc. 46). The County Defendants have also filed a similar Memorandum, Statement and Affidavit Supporting Amount Sought as Sanctions. (Doc. 50). Plaintiff has filed a responsive Memorandum to each of these papers. (Docs. 52, 53). The CMS Defendants have filed a Reply (Doc. 55) and a Motion to Strike (Doc. 56). The County Defendants have filed a Reply. (Doc. 72).

The Memorandum of Defendants CMS, Remillard and Spriggs (Doc. 46) sets out a claim in the total amount of $2928.00, which is calculated on the basis of 14.3 hours of work from July 12, 1996 through July 22, 1996 as follows:

Brian E. Hurley	13.90 hrs. at $200=	2790.00
Kathy McGarvey Hidy	.40 hrs. at $140=	56.00
Total Fees:		$2836.00
Also included are:	Copying Costs	85.40
	Postage	6.60
	Total Expenses:	92.00
	Grant Total:	$2928.00

The affidavit of Brian E. Hurley provides a breakdown of the attorney's hours claims in this matter and identifies the character of the work performed. Mr. Hurley and Ms. Hidy are private practitioners.

The Memorandum of the County Defendants (Doc. 50) sets out their claim in the total amount of $1,690.50 which is calculated on the basis of 11.27 hours of work from July 15, 1996 through July 24, 1996 by attorney Philip L. Zorn, Jr., at $150.00 per hour. An affidavit of Mr Zorn is attached which provides a breakdown of the hours and character of the work performed. Mr. Zorn is an Assistant Prosecuting Attorney for Hamilton County, Ohio.

Plaintiff's responses (Doc. 52 and 53) set forth objections to the Court's order of sanctions and award of attorney's fees and to the amounts claimed by defendants' counsel, respectively. It is argued that plaintiff's counsel was denied due process because she didn't have adequate time to prepare a defense; that the time claimed by Attorney Hurley is exaggerated; that the dependants; motions are duplicative; that the hourly rate claimed by Attorney Hurley is excessive; that the time claimed by Attorney Zorn is exaggerated and that the hourly rate claimed by Attorney Zorn is excessive.

Having carefully considered the matters now before the Court and the papers filed with regard thereto, it is the opinion and finding of the undersigned that the defendants are entitled to recover forthwith the amounts, with certain adjustments, claimed by them as reasonable expenses including attorney's fees incurred in relation to the motions brought before the Court on July 19, 1996. Further, the Court finds that the objections relied upon by plaintiff in the responses (Doc. 52, 53) are not well taken and do not provide a basis for relief from the sanctions ordered by the Court. As just indicated, however, certain adjustments will be made in relation to the amounts claimed.

The July 19th hearing was not a contempt hearing and plaintiff's counsel was not found to be guilty of contempt. The defendants' motions for protective order were heard pursuant to Rule 26(c), F.R. Civ. P. and the sanctions were imposed pursuant to Rule 37(a)(4), F.R. Civ. P. Plaintiff's counsel appeared at the hearing and presented her argument on all the motions. She neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was

argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare.

The schedule of hours submitted by counsel for the CMS, Remillard and Spriggs defendants (Doc. 46, p.2) will be revised by the Court to eliminate the first two items dated July 12, 1996 and July 15, 1996, respectively. The activity described therein would appear to have been necessary in the ordinary course of reviewing the discovery matters then under consideration. The .40 hours and 2.20 hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total number of hours for which payment is to be made is 11.70 hours. The hourly rate of $200.00 for Mr. Hurley appears reasonable and will be allowed. Accordingly, the amount of payment to be made to counsel for these defendants attorney's fees is $2,340.00. The expenses in the amount of $92.00 are allowed, making a total payment of $2,432.00.

Also, the schedule of hours submitted by counsel for the County defendants (Doc. 50, pp. 6-7) will be revised by the Court to eliminate those items listed under the date of July 15, 19965. That activity would likewise appear to have been necessary under the existing circumstances. The total of 1.31 hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total amount of hours for which payment is to be made is 9.96 hours. The hourly rate of $150.00 for Mr. Zorn appears reasonable and will be allowed. The total amount of payment to be made as attorney's fees for the County Defendants is $1,494.00.

The argument of plaintiff's counsel that the services of counsel for the defendants, respectively, are duplicative is misplaced. There are two distinct sets of defendants, each represented by separate attorneys. Each of those attorneys was entitled to proceed in such manner as would best represent his defendants with respect to the serious discovery dispute that had developed. Each of these attorneys did, it is not surprising, proceeding a similar manner pursuant to the Federal Rules of Civil Procedure. That they filed similar motions on similar grounds is not surprising either, and does not, in the opinion of the Court, constitute duplication of work for which compensation should not be made. Inasmuch as the conduct of plaintiff's counsel created the dilemma with which the defendants' attorneys were faced, it is not a detraction from their work effort that

they may have conferred in relation to the course of action to be taken.

Plaintiff's counsel requests a stay of this order pending an appeal. That request will be denied. The Court considers the conduct of plaintiff's counsel to be egregious.

Accordingly, It Is Ordered that:

Plaintiff's counsel forthwith pay to Crabbe, Borwn, Potts & Schmidt, Cincinnati, Ohio, counsel for defendants Correctional Medical Systems, Inc., Remillard and Spriggs, the sum of $2,432.00 as costs and attorney's fees in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc 38).

Plaintiff's counsel forthwith pay to the Treasurer, Hamilton County, Ohio, the sum of $1,494.00, representing costs and attorney's fees incurred by the Office of the Prosecuting Attorney, Hamilton County, Ohio, as counsel for the County Defendants herein in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc. 38).

The request of plaintiff's counsel for a stay of this order pending appeal is

DENIED.

Date:_____ _____

James F. Cook

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kathy Brown,	)	
Plaintiff,	)	
	)	Case No. C-1-95-815
vs.	)	
Correctional Medical Systems,	)	
Inc., et al.,	)	
Defendant.	)	

ORDER

This matter, which has already consumed an inordinate amount of the Court's time, is now before the Court upon a number of motions, appeals from orders of the Magistrate Judge, and requests for sanctions. The Court will dispose of each motion, appeal, and request in this Order to the extent that it is fully briefed.

1. Appeals from Orders of Magistrate Judge Cook

For several months, ending on September 30, 1996, visiting United States Magistrate Judge James Cook monitored this litigation and ruled on discovery related motions. That task assumed the qualities of a full time occupation as the parties filed documents at a frenzied pace. Predictably, Plaintiff has appealed several of the Magistrate Judge's rulings.

Each of the orders from which Plaintiff appeals addresses a nondispositive, discovery-related issue. This court may only reverse an order of a magistrate judge in a discovery matter upon a finding that the order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A); Fed. R. Civ. P. 72(a).

a. Sanctions against Teresa Cunningham

Pursuant to an Order dated July 19, 1996, Magistrate Judge Cook concluded that Plaintiff's counsel, Teresa Cunningham, had failed to comply with requests for discovery and that her conduct

had necessitated intervention by the Court in the discovery process. The Magistrate Judge set the amount of the sanctions based upon submissions by Defendants' counsel regarding their fees and expenses in preparing the motions to compel discovery. Plaintiff appeals from the July 19 and the September 25 Orders.

Ms. Cunningham's conduct clearly necessitated the motions to compel resulting in the Magistrate Judge's Order compelling responses to interrogatories and requests for production. Accordingly, sanctions were mandated, pursuant to Rule 37(a)(4)(A), which is, essentially, self-executing in the event that a motion to compel is granted. The Magistrate Judge did not err in concluding that sanctions were appropriate.

The Magistrate Judge awarded sanctions in the amount of attorney's fees and expenses related to the motions to compel. Rule 37(a)(4)(A) specifically provides for sanctions in that amount. Accordingly, the amount of the Magistrate Judge's award was not contrary to law.

Ms. Cunningham argues that the Magistrate Judge erred by permitting inflated fees and permitting both groups of Defendants to recoup fees for similar activities. The Court does not find the award to be clearly erroneous on those grounds. Ms. Cunningham has not established that the Magistrate Judge's assessment that the requested fees were reasonable is clearly erroneous or contrary to law. Ms. Cunningham has also failed to establish that the two groups of Defendants, who have separate interests in t is litigation and are represented by separate counsel, should not recoup attorney's fees and expenses to the extent that the work performed for each group was similar. Obviously, each group of Defendants was required to act in its own interests in light of Plaintiff's failure to respond to discovery requests. By failing to respond, Ms. Cunningham assumed the risk that both groups of Defendants would incur fees and expenses in petitioning the court to compel discovery. The Magistrate Judge's Orders (Docs. 54 and 110) are hereby AFFIRMED.

b. Expert Witnesses

By Order dated September 5, 1996, Magistrate Judge Cook ruled that Harvey Rosen would not be permitted to testify as an expert witness in Plaintiff's behalf. The Magistrate Judge observed that the expert disclosure deadline had been extended and that Plaintiff had disclosed Mr. Rosen as a witness during the extended period. The Magistrate Judge further observed, however, that the deadline had been extended only for the purpose of permitting Plaintiff to identify a corrections expert to replace a previously disqualified expert. Concluding that Plaintiff was well aware that the deadline had not been extended for other purposes, the Magistrate Judge excluded Mr. Rosen, who is an economist.

Plaintiff was not entitled to disclose expert after the deadline for doing so. Plaintiff had not disclosed an expert economist as of that deadline. The Magistrate Judge extended the d3eadline, but in his September 5 Order he set forth his finding that Plaintiff knew that the purpose of the extension was only to permit the identification of a corrections expert. Obviously, if the extension was thus restricted, Plaintiff cannot argue that other experts could properly be disclosed during the extended period. In any event, Plaintiff has not demonstrated that the September 5 Order was clearly erroneous or contrary to law, and the Order is hereby AFFIRMED.

Plaintiff also appeals from the Magistrate Judge's September 30, 1996 Order pursuant to which he denied Plaintiff's motion to extend the deadline for identifying expert witnesses. The decision whether to extend such a deadline, particularly when the discovery deadline in the case has passed, is within the discretion of the Magistrate Judge's failure to extend the deadline in this case was clearly erroneous or contrary to law. Accordingly, the Magistrate Judge's September 30 Order is hereby AFFIRMED.

c. The Spriggs Memorandum

Shortly before the suicide death of Casey Starcher, Plaintiff's counsel, Teresa Cunningham, and Defendant Joseph Spriggs, an employee of Defendant Correctional Medical Systems, Inc., spoke to one another by telephone concerning Mr. Starcher. Within days after Mr. Starcher's death, Defendant Spriggs drafted a memorandum to his supervisor, Jean Jones, concerning his conversation with Ms. Cunningham.

Plaintiff moved to compel production of the Spriggs memorandum. Magistrate Judge Cook denied the motion on the ground that the document was prepared in anticipation of litigation and Plaintiff had failed to demonstrate that the requirements of Rule 26(b)(3) of the Federal Rules of Civil Procedure were satisfied with respect to the memorandum.

Plaintiff appeals on three grounds. First, Plaintiff contends that the Magistrate Judge erred in concluding that the memorandum was prepared in anticipation of litigation. Second, Plaintiff contends that substantial need has been demonstrated, contrary to the Magistrate Judge's finding. Third, Plaintiff contends that Plaintiff cannot obtain the substantial equivalent of the memorandum without undue hardship.

Magistrate Judge concluded, based upon the affidavits in the record concerning the circumstance in which Defendant Spriggs drafted the memorandum, that the memorandum was prepared in anticipation of litigation. That conclusion is supported by evidence in the record, and the Court does not conclude that it was clearly erroneous or contrary to law.

Pursuant to Rule 26(b)(3), the Court may only compel the production of the memorandum upon a showing by Plaintiff of substantial need and an inability to obtain the substantial equivalent of the memorandum without undue hardship. The Magistrate Judge found that Plaintiff did not make such a showing. The Court concludes that that finding was neither clearly erroneous nor contrary to law.

Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs, during the telephone conversation in question, that Casey Starcher was suicidal and that recent developments in his state criminal case made a suicide watch particularly appropriate. Defendant Spriggs denied that Ms. Cunningham provided such information during their telephone conversation.

Plaintiff has had the opportunity to depose Defendant Sprigs concerning his recollection of the telephone conversation. The evidence in the record indicates that the memorandum also contains Defendant Spriggs recollection of the telephone conversation. Accordingly, Plaintiff has had the opportunity to obtain the substantial equivalent of the memorandum without undue hardship and has not demonstrated a substantial need

for the memorandum. The Magistrate Judge's Order of September 5, 1996 is, therefore, AFFIRMED.

2. Motions Concerning Teresa Cunningham as Counsel

As the Court has observed, Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs in a telephone conversation shortly before Casey Starcher's suicide that Mr. Starcher was suicidal and that recent events made a suicide watch advisable. Defendant Spriggs has denied that Ms. Cunningham provided that information during the telephone conversation. Defendants have moved to disqualify Ms. Cunningham as counsel for Plaintiff in light of the likelihood that she will be called as witness for Plaintiff. Ms. Cunningham has opposed the motions, has moved to strike one of the motions, and has refused to inform the Court whether she intends to testify, even when the Court has explicitly ordered her to do so. Ms. Cunningham has also moved for a protective order and to quash Defendant's subpoena duces tecum.

Plaintiff has not identified a viable alternative to Ms. Cunningham's testimony. Ms. Cunningham is the only witness to the telephone conversation in question other than Defendant Spriggs who denies Plaintiff's allegations concerning the content of the conversation. Without engaging in a thorough analysis of Plaintiff's claims, the Court believes that the allegations concerning the contents of the conversation are essential to some or all of Plaintiff's claims. Accordingly, if Plaintiff intends to prove those claims, Ms. Cunningham will be required to testify to her recollection of the telephone conversation with Defendant Spriggs.

Disciplinary Rule 5-101 of the Code of Professional Responsibility, which is binding upon Ms. Cunningham as a member of the Ohio bar, provides, in pertinent part, as follows:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe

> that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Disciplinary Rule 5-102 provides, in pertinent part, as follows:

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-1`01 (B)(1) through (4).

Ethical Consideration 5-9 elaborates upon the potential conflict created when an attorney acts as both witness and counsel:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he become more easily impeachable for interest and thus may be less a effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes an witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively.

Ethical Consideration 5-10 explains that "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

This Court recognized that motions to disqualify counsel should be considered with extreme caution, in view of the litigant's interest in retaining counsel of the litigant's choice and the danger that an opposing party may use a motion to disqualify to obtain a tactical advantage. See Paretti v. Cavalier Label Co., Inc., 722 F. Supp. 985 (S.D. N.Y. 1989); see also Evans v. Artek Systems Corp., 715 F.2d 788, 791-92 (2d Cir. 1983). The Court also recognizes that care must be taken before disqualifying an attorney since interlocutory appeals are generally unavailable from such orders. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); In re Mechem, 880 F.2d 872 (6th Cir. 1989). Nevertheless, neither the United States Court or Appeals for the Sixth Circuit nor the Supreme Court of Ohio has hesitated to rule that an attorney whose testimony would cause a conflict under DR 5-101(B) or DR 5-102 must either voluntarily withdraw from the case or face disqualification. General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704 (6th Cir. 1982); Mentor Lagoons, Ionc. V. RubinU, 31 Ohio St.3d 256, 260 (1987).

In this case, the Court concludes that Teresa Cunningham cannot continue as counsel for Plaintiff in light of her role as witness. The Court recognizes that Ms. Cunningham has not conceded that she will testify. As the Court has observed, however, Plaintiff has not identified a means of proving the alleged version of the telephone conversation other than by Ms. Cunningham's testimony. Accordingly, it is "obvious", for purposes of the Disciplinary Rules, that Ms. Cunningham ought to be called as a witness, and the Court ascribes no credibility to her equivocation concerning her intentions. Defendants' motions to disqualify Ms. Cunningham as counsel for Plaintiff (Docs. 63 and 88) are, therefore, GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify (Doc. 67) is DENIED.

Ms. Cunningham has submitted a motion for a protective order, to quash a subpoena issued by Defendants, and for sanctions (Doc. 106) related to attempts by counsel for Defendants to depose her. Ms. Cunningham's arguments in support of that motion are based upon her previous status as counsel for Plaintiff. Because she is no

longer Plaintiff's counsel, the issues raised by her motions are predominately moot. Defendants may depose her, and she is obligated to respond to the extent that she may do so without disclosing privileged information. Her motions related to Defendants' attempts at discovery (Doc. 106) are hereby DENIED.

3. Conclusion

The Order of visiting United States Magistrate Judge James Cook dated July 19, September 5, September 25, and September 30, 1996 (Docs. 38, 85 86, 99, and 105) are hereby AFFIRMED. Defendants' motions to disqualify Teresa Cunningham as counsel for Plaintiff (Docs. 63 and 88) are hereby GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify Ms. Cunningham (Doc. 67) is hereby DENIED. Ms. Cunningham's motion for protective order, to quash, and for sanctions (Doc. 106) are hereby DENIED. The motions of Hamilton County and Correctional Medical Systems for sanctions (Doc. 73 and 74) are hereby DENIED.

Defendants may take the deposition of Teresa Cunningham on or before October 31, 1996. Ms. Cunningham is DIRECTED to attended a deposition scheduled by Defendants, and Defendants are INSTRUCTED to consult with Ms. Cunningham in order to identify a mutually agreeable time and date for the deposition. Ms. Cunningham is ADVISED to respond to questions posed to her at such a deposition unless she is unable to do so in light of the attorney-client privilege. Counsel for Defendants may contact the Court in the event that difficulties arise in the scheduling or execution of Ms. Cunningham's deposition.

Dispositive motions may be filed on or before November 4, 1996. Opposing memoranda must be filed and served, via hand delivery or facsimile, on or before November 19, 1996. Reply memoranda must be filed and served, via hand delivery or facsimile, on or before November 29, 1996. The Court will conduct the final

pretrial conference in this matter as scheduled on December 13, 1996.

IT IS SO ORDERED.

Sandra S. Beckwith
United States District Judge

No. 96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARWIN LEE STARCHER, Plaintiff, TERESA CUNNINGHAM, Attorney-Appellant, v. MEDICAL CORRECTIONS SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, Sheriff; SALLY REMILARD; Administrator of Correctional Medical Systems; JOSEPH STRIGGS, Employee of Correctional Medical Systems, Defendants-Appellees.	)	ORDER

Before: MERRITT, CONTIE, and BOGGS, Circuit Judges.

The plaintiff's attorney appeals from an interlocutory order imposing sanctions under Rule 11, Fed. R. Civ. P. The defendants move to dismiss the appeal for lack of a final, appealable order. The appellant-attorney opposes the motion to dismiss and requests sanctions be imposed against the defendants for filing the motion to dismiss.

There is a split among the Circuit Courts of Appeals as to whether in interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable. *Compare Appeal of Lict & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distributors, Inc. v. Maico-Fahzeugfabrik*, 658 F.2d 944 (3d Cir. 1981); *Click v. Abilene National Bank*, 822 F.2d 544 (5th Cir. 1987); *Howard v. Mail-Well Envelope Co.*, 90 F. 3d 433 (10th Cir.), *cert. Denied*, 117 S.Ct. 484 (1996); *G.J.B. & Assoc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Sanders Associates, Inc. v.*

Summagraphics Corp., 2 F.3d 394 (Fed. Cir. 1993); with *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Aetna Life Ins. Co. f. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Transamerica Commercial Fin. Corp. v. Banton, Inc.* 970 F.2d 810 (11th Cir. 1992). In light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised.

It therefore is ORDERED that the motion to dismiss is denied at this time. The appellants' request for sanctions is also denied. The parties are directed to address the court's jurisdiction in their appellate briefs.

ENTERED BY ORDER OF THE COURT

_____

Clerk

DARWIN LEE STARCHER and KATHY BROWN, Plaintiffs, TERESA CUNNINGHAM, Attorney-Appellant, v. CORRECTIONAL MEDICAL SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, individually and in his capacity as Sheriff; SALLY REMILARD; and JOSEPH SPRIGGS, Defendants-Appellees.

No. 96-4250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May 21, 1998, Filed

COUNSEL: ARGUED: Teresa L. Cunningham, Cincinnati, Ohio, for Appellant.

ARGUED: Philip L. Zorn, Jr., HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

JUDGES: Before: BOGGS, MOORE, and FARRIS,* Circuit Judges. BOGGS, J., delivered the opinion of the court, in which FARRIS, J., joined. MOORE, J., delivered a separate dissenting opinion.

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

DARWIN LEE STARCHER and KATHY BROWN, Plaintiffs, TERESA CUNNINGHAM, Attorney-Appellant, v. CORRECTIONAL MEDICAL SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, individually and in his capacity as Sheriff; SALLY REMILARD; and JOSEPH SPRIGGS, Defendants-Appellees.

No. 96-4250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May 21, 1998, Filed

COUNSEL: ARGUED: Teresa L. Cunningham, Cincinnati, Ohio, for Appellant.

ARGUED: Philip L. Zorn, Jr., HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

JUDGES: Before: BOGGS, MOORE, and FARRIS,* Circuit Judges. BOGGS, J., delivered the opinion of the court, in which FARRIS, J., joined. MOORE, J., delivered a separate dissenting opinion.

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* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

BOGGS, Circuit Judge.

Attorney Teresa Cunningham's appeal requires us to opine on an issue that has divided our sister circuits: whether an attorney who eventually withdraws or is disqualified from a case may take an immediate, interlocutory appeal from an order in that case levying attorney's fees and costs against her for discovery violations. We believe the better view to be that an attorney in these circumstances may not take an immediate appeal, but rather must wait to file an appeal until final judgment is entered in the case. Because we lack jurisdiction to entertain this interlocutory appeal, we cannot disturb the order assessing attorney's fees and costs against Cunningham.

I

On September 19, 1995, Cunningham (a sole practitioner) filed suit under 42 U.S.C. § 1983 against defendants Correctional Medical Systems, Inc. ("CMS"), two CMS employees, Hamilton County, Ohio, and the Hamilton County sheriff. The complaint Cunningham filed on behalf of plaintiff Darwin Lee Starcher alleged that the defendants negligently failed to supervise Starcher's son Casey, despite his known history of suicide attempts, and thus violated Casey's constitutional rights. Casey committed suicide while incarcerated in the Hamilton County jail.

In March 1996, the magistrate judge assigned to the case entered a scheduling order. The scheduling order required that the plaintiff designate experts by June 7, 1996, and that the defendants designate experts by July 19, 1996. It also set a discovery cut-off date of September 16, 1996, and a deadline of October 16, 1996, for filing dispositive motions. Cunningham's representation was fraught was difficulties even from the earliest days of this litigation. To begin with, it was apparent early in the case that Cunningham might be a material witness in the case because she spoke to a CMS official about Casey Starcher's psychiatric condition just a few days before Casey's suicide. For that reason, on four separate occasions the defendants moved to disqualify Cunningham as counsel. The magistrate judge denied the first three of these motions.

While she was opposing these motions to disqualify, Cunningham also managed to get into serious discovery trouble. The

on July 25, as ordered by the court.[1] Nonetheless, Cunningham refused to withdraw her deposition notice and the defendants resorted to filing a motion for protective order. Simultaneously, the defendants moved for an award of the attorney's fees they incurred in seeking court intervention to force Cunningham to comply with the earlier discovery order.

The magistrate judge scheduled a hearing for July 19, 1996. Cunningham attended this hearing, along with counsel for all defendants. At the hearing, Cunningham argued that she should be excused for failing to comply with her discovery obligations both because the defendants had served "contention" interrogatories,[2] the answers to which allegedly depended on documents to be produced by the defendants, and because her client had died and the new administrator of the Starcher estate was not returning her telephone calls. The only reason Cunningham gave for noticing a deposition on a date different from the date previously ordered was that defense counsel would not consent to a change in the time and location of the deposition. Significantly (as explained below), Cunningham did not ask for additional time to prepare a defense to the motion for fees and costs, nor did she object to the timing of the hearing.

After hearing from all counsel, the magistrate judge ruled for the defendants on all issues. In particular, he issued a new order requiring Cunningham to supplement her discovery responses with full and complete responses within 10 days, he granted the defendants' motion for a protective order quashing the notice of depositions of the two defendants until Cunningham's discovery responses were received, and he granted defendants' motions for fees and costs, instructing defense counsel to file a bill of costs. The magistrate judge then received memoranda from the parties concerning the propriety of the fee award against Cunningham. In her memorandum, Cunningham argued (1) that the defendants' motions for fees and costs were received only shortly before the hearing before the magistrate judge, (2) that the magistrate judge's

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[1] Cunningham testified that the reason she did not contact defense counsel to work out a compromise was that she "knew from prior experience from working with them that it wouldn't do any good; it would be a waste of time."

[2] "Contention" interrogatories are interrogatories that seek to clarify the basis for or scope of an adversary's legal claims. The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required. *See, e.g., Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1997).

original July 10, 1996, order, requiring discovery responses by July 12th, gave her only two days within which to respond to discovery (despite the fact that she actually had the entire period from May 29th through July 12th to file responses), and (3) that the amount of requested attorney's fees was too high.

The magistrate judge rejected these arguments. He noted that the July 19th hearing had been scheduled on short notice "in view of the apparent urgency of these motions." He also stated that "all counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record." The magistrate judge then stated that:

> The authority for the [fees and costs imposed] by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants' motion for protective orders were granted after a hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants [sic] counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

With these findings in mind, the magistrate judge ordered Cunningham to pay $2928.00 in attorney's fees, copying costs, and postage to CMS, and $1690.50 in attorney's fees to the county defendants. The magistrate judge further noted that Cunningham "neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare." In closing, the magistrate judge stated that "the Court considers the conduct of plaintiff's counsel to be egregious." Over Cunningham's objections, the district court affirmed the magistrate judge's award of fees and costs. Simultaneously, the district court granted the defendant's motion to disqualify Cunningham as plaintiff's counsel. This appeal followed.

II

A

The final judgment rule, reflected in 28 U.S.C. § 1291, has deep roots in American law. *See Cobbledick v. United States*, 309 U.S. 323, 326 (1940) (noting origin of final judgment rule in Judiciary Act of 1789). Both to ensure the integrity of the trial process and to improve the efficiency of the judicial system, the final judgment rule essentially provides that interlocutory orders entered by a trial court -- such as discovery orders entered during pretrial proceedings, or evidentiary rulings made during trial -- may not be reviewed by an appellate court until the trial court enters a final judgment disposing of all claims at issue in the case.[3] More than 90 years ago, a unanimous Supreme Court held that an order compelling the production of discovery materials is a non-appealable interlocutory order. *See Alexander v. United States*, 201 U.S. 117 (1906). In *Alexander*, the Supreme Court recognized that "in a certain sense finality can be asserted" as to such orders, but only in the same sense that "finality can be asserted of any order of a court." *Id.* at 121. The Court therefore laid down a general rule governing the appealability of discovery orders: an individual subject to a discovery order can either obey the order, or can refuse to comply and face punishment for contempt. Because a contempt judgment is personal to the individual resisting the discovery order, and is considered final as to that individual, an immediate appeal is available. *See id.* at 122. In Alexander, however, rather than openly resist a discovery order, the appellants simply appealed the order.

[3] The principal exceptions to the final judgment rule are, first, Fed. R. Civ. P. 54(b), which permits a trial court to direct the entry of a "final judgment" in a case even though that judgment will not dispose of all claims (or will dispose of all claims, but not as to all parties) in the case; second, 28 U.S.C. § 1292(b), which permits an appeal from an interlocutory order if the trial court certifies that the order raises a controlling question of law as to which there is substantial ground for difference of opinion, and if the appellate court exercises its discretion to hear the appeal; and third, the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949), which permits the interlocutory review of certain collateral orders that conclusively determine a disputed question, that resolve an important issue, and that would be effectively unreviewable on appeal from a final judgment.

The Supreme Court dismissed the appeal for want of jurisdiction because there was no final judgment as to the appellants. *See ibid.*

Alexander remains the general rule governing appeals from discovery orders.[4] However, the Supreme Court has carved out an exception for a "small class" of discovery and other interlocutory orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949). Our task today is to decide whether an order requiring the plaintiff's attorney to pay to defense counsel the costs incurred as a result of moving to compel discovery qualifies as a member of the "small class" of immediately appealable collateral orders contemplated in *Cohen*.

In addressing this question, two prefatory comments are required. First, while we are sympathetic to the plight of Ms. Cunningham, who may, as a practical matter at this late date, have no avenue for appellate review other than this proceeding,[5] the mere fact that she may be unable to obtain appellate review does not enter into our jurisdictional analysis. As the unanimous Supreme Court has said, "the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice. Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick*, 309 U.S. at 325. Second, our subjective assessment of the importance, if any, of the underlying issues raised by Cunningham's appeal also cannot enter into our analysis. The Supreme Court has declined to extend the collateral-order doctrine to cover appeals from judgments of even the most sweeping import. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (holding class-certification order not appealable under *Cohen*); *cf. In re Rhone-Poulenc Rorer, Inc.*, 51

[4] The Supreme Court's adherence to the Alexander procedure for obtaining appellate review of discovery orders has been unswerving. *See Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992); *United States v. Ryan*, 402 U.S. 530 (1971).

[5] The underlying case has been dismissed by the district court since this appeal was filed, and Cunningham did not file a notice of appeal from the order dismissing the case.

F.3d 1293, 1295 (7th Cir. 1995) (recognizing broad significance of class-certification orders and noting that writ of mandamus was required to obtain appellate review of such an order).

B

The precise question presented today is whether Cunningham, an attorney representing the plaintiff who was disqualified as counsel during the course of the litigation below, has a right to an immediate appeal from an order imposing attorney's fees and costs on her because her opponents were forced to move for an order compelling her to comply with a previous discovery order. To qualify as an immediately appealable collateral order under *Cohen*, this order would have to conclusively determine the disputed question (here, Cunningham's liability for attorney's fees and costs), resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal. It is beyond dispute that the first *Cohen* factor is satisfied here; accordingly, we focus our attention on factors two and three.

The circuits have divided over the question of whether a discovery order directed at an attorney participating in the underlying lawsuit raise issues "completely separate from the merits of the action."[6] Five circuits have held that orders similar to the order at issue in this case (including orders imposing sanctions under Fed. R. Civ. P. 11, orders assessing attorney's fees under Fed. R. Civ. P. 37, and others) are so completely separate from the merits of the underlying action as to be immediately appealable by the attorney subject to the order. *See Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 (11th Cir. 1992); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Med. Svcs, Inc.*, 855 F.2d 1470, 1472-73 (9th Cir. 1988); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985); *Cheng v. GAF Corp.*, 713 F.2d 886, 889 (2d Cir. 1983). Five other circuits have come to the opposite conclusion. *See Sanders Assocs., Inc. v.*

[6] We recognize, of course, that Cunningham was no longer participating in the case at the time she filed this appeal; she had been disqualified as counsel on the same day the district court affirmed the magistrate judge's order imposing attorney's fees and costs against her. We discuss the question of whether this distinction matters in Section II.C, *infra*.

Summagraphics Corp., 2 F.3d 394 (Fed. Cir. 1993); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564, 569-70 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981).

Because our circuit has not yet stepped into these cross-currents, we are especially mindful of *Cohen*'s dictum that practical considerations are paramount in deciding whether a particular kind of order qualifies for immediate appeal under the collateral order doctrine. *See Cohen*, 337 U.S. at 546. In this regard, it is telling that even some of those circuits that initially embraced the idea that an attorney could immediately appeal an order imposing discovery sanctions have since recognized its significant potential for disruption of the trial process. The Second Circuit, for example, recently noted that its precedent permitting attorneys immediately to appeal sanctions orders led to a "flurry of arguments, charges and countercharges, motions and cross-motions and other papers in the district court" that "effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying . . . litigation." *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997). In light of the practical effects of its precedent, the court went so far as to say that "were we writing on a clean slate, we would be tempted to confine *Cheng* to its unusual facts and characterize the sanctions order here as nonappealable under the *Cohen* doctrine." Ibid. Similarly, the Seventh Circuit recently acknowledged that its precedents permitting immediate appeals by sanctioned attorneys "have not played to universal acclaim," and noted that extension of these precedents "would produce a substantial, and unjustified, erosion of the final-decision requirement." *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997).

In short, several circuits have experimented with the "immediate appeal" rule urged by Cunningham, and the experience has not been positive. We therefore are not persuaded that the issues presented by an appeal such as Cunningham's reliably could be deemed completely separate from the merits of the underlying case. It is conceivable, of course, that in an extreme case where an attorney provides absolutely no response to discovery, the issue of the attorney's compliance with a discovery order would not implicate any merits issues. But here, Cunningham provided responses to at least some of the defendants' discovery requests, and presumably her

challenge to the district court's Rule 37 order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits. We therefore conclude that the issues involved in Cunningham's appeal likely would not turn out to be "completely separate" from the merits of the underlying case.

C

Our dissenting colleague argues that the crucial fact entitling Cunningham to an immediate appeal is that she was disqualified as counsel in the underlying case and that, therefore, her appeal is lexically "separate" from the issues involved in the underlying case. *See infra* at 18-20. On this issue too, the circuits are split. Of the five circuits (First, Third, Fifth, Tenth, and Federal) that refuse to permit a participating attorney to file an immediate appeal under the collateral order doctrine, two have held nevertheless that an attorney who has withdrawn from representation in the underlying case is entitled to an immediate appeal. *See Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985). By contrast, one of these circuits has specifically reached the opposite conclusion. *See Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir.), *cert. denied*, 117 S. Ct. 84 (1996).[7]

We believe the better view is that a non-participating attorney, like a participating attorney, ordinarily must wait until final disposition of the underlying case before filing an appeal. For one

[7] In addition, the D.C. Circuit recently held that a non-participating law firm was not entitled to an immediate appeal of a discovery order. *See In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). While the law firm in that case was never involved in a representative capacity in the underlying case (it was instead the target of a civil subpoena), the fact that the firm was not deemed entitled to an immediate appeal provides strong further support for the proposition that the attorney's involvement or lack of involvement in the underlying case cannot be dispositive in determining whether the attorney is entitled to an immediate appeal. Surely if an attorney who was never involved in a case is not sufficiently "separate" from the case to warrant immediate appellate review, an attorney (like Cunningham) who was involved but subsequently is disqualified cannot be entitled to an immediate appeal.

thing, it would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985) (order disqualifying counsel in civil case not immediately appealable under collateral order doctrine). Moreover, from a practical perspective, there are serious administrative problems with a rule that hinges on whether the attorney subject to the discovery order is a participating or non-participating attorney. Here, by sheer fortuity, it happens that the order affirming the magistrate judge's order that Cunningham pay attorney's fees was issued on the same day as the order disqualifying Cunningham from the case. We can easily conceive of cases where this does not happen -- where, for example, an attorney is ordered pursuant to Rule 37 to pay attorney's fees associated with a discovery dispute, and then does not withdraw or become disqualified as counsel for months or years afterward. In such a case, when would the 30-day filing period of Fed. R. App. P. 4 begin to run -- from the date of the Rule 37 order, or from the date of withdrawal? Either outcome strikes us as fraught with difficulty.

Expanding the collateral order doctrine to cover cases like Cunningham's seems particularly unwise at a time when requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses. Creating a distinction between participating and non-participating attorneys could add another tactical arrow to the arsenal; litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case. For all these reasons, we decline to adopt a distinction between participating and non-participating attorneys for purposes of the collateral order doctrine.

D

Because Cunningham's appeal does not satisfy the second element of the *Cohen* test, we need not address the third element -- whether the order would be effectively unreviewable absent an interlocutory appeal -- in any great detail. As on the other dimensions of this case, the circuits are divided fairly evenly between those that believe a sanctioned attorney satisfies the third *Cohen* factor and those that do not. This circuit split is somewhat

puzzling in light of the Supreme Court's recognition that orders awarding attorney fees are appealable independent of the disposition of the merits of the underlying case. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200 (1988). We see no reason why, after final resolution of the underlying case (whether the resolution be a judgment for plaintiff, a judgment for defendant, or an out-of-court settlement), a sanctioned attorney should be unable to appeal the order imposing sanctions. Of course, if the person involved is a non-participating attorney, this may require her to monitor the progress of the litigation with some care. This fact does not change our analysis of the third *Cohen* factor, however; it is important not to "improperly blur the line between the impossibility of effective review necessary under the *Cohen* doctrine and [the] mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal." *Howard*, 90 F.3d at 437.

III

For the foregoing reasons, we conclude that we have no jurisdiction over Cunningham's appeal. Therefore, the appeal is DISMISSED.

KAREN NELSON MOORE, Circuit Judge, dissenting.

I write separately to highlight the unnecessarily broad brush the majority uses to paint on this otherwise narrow canvass. Specifically, I harbor grave concerns regarding three facets of the majority opinion. First, the majority holds that sanctions orders, such as the one appealed from in this case, fail to satisfy the second *Cohen* element requiring that the merits of the underlying litigation be separate from the sanctions order.[8] *See* Slip Op. at 9-12. Second, the majority rejects any distinction between those attorneys who are and those who are not participating in the underlying litigation, despite the weight of authority accepting this distinction. Finally, the majority ignores the inequity of applying its new rule, retroactively,

[8] In dictum, the majority notes that maybe in an "extreme case" the sanctions order "would not implicate any merits issues." Slip Op. at 12.

to bar a merits review of the issues raised by Cunningham in this appeal. *See* Slip Op. at 8, n.5.

In my view, Cunningham's appeal satisfies the second *Cohen* requirement in that the sanctions order is separate from the merits of the underlying action. Although in some instances sanctions orders may be intertwined with the merits, none of these circumstances are present in this case. For example, in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990), the plaintiff's lawyer failed to turn over notes requested by the defendant's lawyer and then used those notes at trial. The district court sanctioned the plaintiff's lawyer for failing to produce the notes to defendant's counsel. On appeal, the Tenth Circuit held that the sanctions arose from a discovery dispute over the relevance of the notes. Accordingly, any evaluation of relevancy would necessarily require the court to examine the merits of the underlying action. The court thus concluded that the attorney's appeal failed to satisfy the *Cohen* requirements and should await a final judgment in the case. *Accord Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981) (dismissing appeal for failure to satisfy *Cohen* requirements where review of sanctioning of attorney for filing dilatory discovery motions required examination of relevance to underlying dispute). *Cf. Evanson v. Union Oil Co. of California*, 619 F.2d 72 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980) (sanctioned party requested appellate court to vacate district court's sanction order for lying in interrogatory answers, and court of appeals refused where determining truth or falsity of answers would require it to evaluate the merits of the underlying action).

Contrast the holdings in the preceding cases with the holding in *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989). In that case, the magistrate judge imposed monetary sanctions on an attorney under Rule 37 for failure to provide complete answers to interrogatories and for failure to produce requested documents, and the district court affirmed the sanctions order. On appeal, the Second Circuit concluded that the appeal satisfied the second *Cohen* requirement "since the imposition of the sanction involves an issue completely separate from the merits of the underlying litigation." *Id.* at 685 (quotation omitted).

The facts presented in Cunningham's appeal more closely resemble the facts in *Thomas E. Hoar, Inc.* than those facts presented in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson*. Specifically, unlike the appellants in those cases, Cunningham does

not contend that her failure to answer the discovery turned on the relevance or scope of the discovery, or that her answers were true where the district court found them to be false. Those kinds of contentions could have required this court to evaluate the merits of the underlying action to determine if the interrogatories were relevant, covered an appropriate time frame, or whether Cunningham's responses were in fact true. As the courts in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson* correctly concluded, any such evaluation of the merits would by its very nature run afoul of *Cohen*'s requirement that the sanctions order and the merits be "completely separate."

Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments against the sanctions order involve the substance of the discovery itself. Consequently, like the appellant's due process objection in *Thomas E. Hoar, Inc.*, resolution of Cunningham's timing and due process objections to the sanctions order would not compel us to address the merits of the underlying action. Therefore, Cunningham's appeal satisfies the second *Cohen* requirement. In my view, the majority opinion needlessly forecloses the possibility that some sanctions orders, not just those in an "extreme case," will not be intertwined with the merits and thus will satisfy the second *Cohen* requirement.

Next, the majority rejects the participating and non-participating attorney distinction. However, of the five circuits to consider this issue explicitly, four have found this distinction persuasive. *Compare Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997) ("As a general rule an attorney must await the end of litigation in the district court to appeal a sanction . . . .However, we recognize[] an exception to this rule in those situations in which the sanctioned attorney is no longer involved in the case and an appeal of the sanctions order would not impede the underlying litigation."); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985) (holding that a sanctioned attorney who has withdrawn from the representation may take an interlocutory appeal under *Cohen*); *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 731 (9th Cir. 1995) (sanctioned counsel who has withdrawn from the representation may take an

interlocutory appeal under *Cohen*); *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984) (same), *with Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir. 1996) (rejecting interlocutory appeal of sanctions order by withdrawn attorney).

With respect to *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), cited by the majority in a footnote, that case did not address the issue of whether a sanctioned attorney who has withdrawn or been disqualified from representing a party to the underlying action may immediately appeal the sanctions order. Instead, that case addressed the issue of whether a law firm subjected to a subpoena duces tecum relating to a case in another district court in which it was not a party could immediately appeal an order of a federal district court transferring the case to that other federal district court. The D.C. Circuit held the law firm could not immediately appeal such an order, but must either disobey the order, be cited for contempt, and then appeal the contempt order, or must file a petition for a writ of mandamus. *See id.* at *1. In that case, the law firm proceeded by way of a mandamus petition. Accordingly, the Sealed case, which focuses on a peripheral issue, provides little support for the Tenth Circuit's position in Howard denying an immediate appeal of the sanctions order to a sanctioned attorney who no longer represents a party in the underlying action, a position that is contrary to the weight of published authority.

The Tenth Circuit bases its restrictive position on the ground that a sanctioned attorney no longer connected to the underlying action may appeal at the conclusion of that action, whether the court issues a final judgment, or the parties settle the case. Thus, the Tenth Circuit holds the sanctioned attorney fails to meet the third *Cohen* requirement of demonstrating that the sanctions order will be effectively unreviewable on appeal from a final judgment. *See Howard*, 90 F.3d at 436-37. This is a debatable issue, as manifested by the even split among our sister circuits when the sanctioned attorney remains as an attorney in the underlying litigation. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits hold that a sanctioned attorney meets this third requirement. *See, e.g., Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95-96 (2d Cir.), *cert. denied*, 118 S. Ct. 337 (1997); *Serritella v. Markum*, 119 F.3d 506, 512 (7th Cir.), *cert. denied sub nom. Steagall v. United States Dist. Court of Cent. Dist. of Ill.*, 118 S. Ct. 566 (1997); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995);

Transamerica Commercial Fin. Corp. v. Banton, Inc., 970 F.2d 810, 814 (11th Cir. 1992). Conversely, the First, Third, Fifth, Tenth, and Federal Circuits hold that a sanctioned attorney who remains as counsel in the litigation fails the third *Cohen* requirement. *See, e.g., In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394, 398 (Fed. Cir. 1993).

Today, the majority rejects the weight of authority, holding that a nonparticipating attorney, such as Cunningham, cannot take an interlocutory appeal of a sanctions order. Adopting the reasoning in Howard, the majority holds that in this circuit, a sanctioned attorney, whether participating or nonparticipating in the underlying action, must wait until the termination of that litigation to take an appeal of the sanctions order. In holding that adequate and effective appellate review is available at the conclusion of the case, the majority renders it impossible for nonparticipating sanctioned attorneys to satisfy the third *Cohen* requirement. Although I remain unpersuaded by the majority's view that nonparticipating attorneys must await the conclusion of the underlying action in order to appeal the sanctions order, I am bound by this new holding that review is both available and effective when delayed until the conclusion of a case in which the attorney no longer has a role.

Having announced a new rule in this circuit, the majority suggests that its holding applies retroactively so as to bar a merits review of the issues Cunningham raises in this appeal. *See* Slip Op. at 9 & n.5. Because Cunningham did not file a notice of appeal upon the termination of the underlying litigation, retroactive application of the majority decision effectively bars any review of the district court's sanctions imposed upon her. The inequity of this result is patently obvious. When faced with a similar situation, the Tenth Circuit in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990), refused to impose such an unfair result on the attorney, explaining that

> the sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible, to foretell. Consequently, to apply our holding retroactively would be inequitable. . . . If we dismiss [the

> attorney's] appeal for want of jurisdiction, he will be remediless for the time has passed to file a new notice of appeal from the final judgment. While the aim of our holding--to effectuate the purposes of the final judgment rule--would not be hampered by its retroactive application, the small benefit we would gain by applying our holding retroactively does not outweigh the inequity which would result from such a determination. Accordingly, we conclude that our holding should not apply retroactively . . .

Id. at 829-30. As in *G.J.B.*, principles of equity militate here against retroactive application of the majority's new rule and compel this court to conduct a merits review of the issues Cunningham raises in this appeal.

For the foregoing reasons, I respectfully dissent.

DARWIN LEE STARCHER AND KATHY BROWN, Plaintiffs,
TERESA CUNNINGHAM, Attorney-Appellant, v.
CORRECTIONAL MEDICAL SYSTEMS, INC. ET AL.,
Defendants-Appellees.

96-4250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

August 5, 1998

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and discussion of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

(2)

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No. 98-727

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

TERESA L. CUNNINGHAM,
Petitioner,

v.

HAMILTON COUNTY, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HAMILTON COUNTY, OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court allow Petitioner, an attorney who was disqualified from a case, to take an immediate interlocutory appeal under the collateral-order doctrine from an order levying attorney's fees against her for conduct relating to discovery violations in that case, or must Petitioner wait to file an appeal until final judgment is entered in the case?

2. Where the Circuit Court of Appeals lacks jurisdiction to entertain Petitioner's immediate interlocutory appeal, should Petitioner, who was fully aware of the possibility that her immediate appeal could be dismissed for lack of jurisdiction, be retroactively given an additional opportunity to obtain of appellate review when she did not file a notice of appeal from the order dismissing the underlying case?

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JURISDICTION

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." Respondent, while acknowledging that the Sixth Circuit Court of Appeals is in conflict with other circuits, submits that this conflict is not on a matter of great legal importance and there are no compelling reasons to grant the within Petition and it must be denied.

STATEMENT OF THE CASE

The 42 U.S.C. §1983 lawsuit underlying this Petition arose from the suicide death of inmate Casey Starcher in the Hamilton County Justice Center in Hamilton County, Ohio. Resp. C.A. Br. 3. On behalf of the Estate, Petitioner asserted that Respondent, Hamilton County and Defendant-Appellee Correctional Medical Systems, Inc. (hereinafter "CMS") violated Mr. Starcher's constitutional rights by failing to prevent his suicide while he was incarcerated at the Hamilton County Justice Center ("HCJC"). Id. When the Complaint in this action was filed the Estate's trial counsel was Petitioner, attorney Teresa Cunningham. Id. Unbeknownst to Respondent and CMS, Petitioner was also an important, if not the most important, witness for the Estate. Id.

In March 1996, a scheduling order was issued. The expert identification deadline for the Estate was June 7, 1996, and July 19, 1996, for Respondent and CMS. Id. at 4. To be sure that it received the Estate's responses to its discovery request prior to the July 19, 1996, expert-identification deadline, CMS on May 29, 1996, served the Estate with its first discovery requests. Id. at 5. Due to the expert-

identification date of July 19, 1996, counsel for CMS informed Petitioner, that unless that date was changed, it was necessary for CMS to receive timely and full responses to its discovery requests. However, in response Petitioner stated that those responses would not be made in a timely manner because Darwin Lee Starcher, the administrator of the Estate, had died. Resp. C.A. Br. 5; Pet. C.A. Br. 5, 6; Pet. 3. Petitioner refused to provide any responses to CMS's discovery requests or to provide a commitment as to when they would be made. As a result, CMS, was on July 1, 1996, forced to file a Motion To Compel And For Extension Of Time To Identify Expert Witnesses. Resp. C.A. Br. 5 & 6.

Further, after learning that Petitioner was clearly a witness for the Estate, Respondent and CMS attempted to take her deposition and filed their first two of four motions to disqualify Petitioner as the Estate's trial counsel. Id. at 6. Despite the fact that it was "obvious" that she would be called as a witness for the Estate, Petitioner vigorously opposed these motions. Petitioner's dual role in the litigation (i.e. trial counsel and witness) continued until October 22, 1996, when she was coincidentally disqualified on the same day that the subject Order to pay attorney's fees was issued. Id. at 6; Pet. App. 10a-18a, 31a; Pet. 4.[1]

On July 10, 1996, Magistrate Judge Cook held an informal discovery conference which was attended by all trial counsel, including Petitioner. (By that time Petitioner already

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[1] Although Petitioner was disqualified, she continued to be involved in the matter as detailed in the Response of Appellees Correctional Medical Systems, Inc., To Suggestion For Rehearing En Banc and Respondent's Motion adopting said response. *See also* Section IV. infra.

had had forty (40) days to respond to CMS's discovery requests.) At that conference and in Petitioner's presence, Magistrate Judge Cook rejected the Estate's arguments and objections as to why it had not met its discovery obligations and ordered that:

1. the Estate was required to make full and complete responses to Appellee CMS's discovery requests by 4:00 p.m. on July 12, 1996;

2. the deposition of Rex Smith would be taken on July 25, 1996 in Cincinnati, Ohio; and

3. the deposition of defendants Remillard and Spriggs would be taken on July 25, 1996, only if the Estate complied with the first directive. Resp. C.A. Br. 6 & 7; Pet. App. 2a-3a.

As Magistrate Judge Cook made clear, Petitioner ". . . was advised of and understood the July 12th, 4:00 p.m. deadline at the conference on July 10th." Resp. C.A. Br. 7; Pet. App. 4a; Pet. 3. Of significance, even though CMS's motion to compel was granted, sanctions were not imposed at that time. Resp. C.A. Br. 7.

Yet, on July 12, 1996, Petitioner produced no documents; did not provide any responses to most of the interrogatories, but instead made belated and meritless objections which had already been rejected; made grossly incomplete responses to other interrogatories; made no responses to other interrogatories; and in direct violation of the Order of July 12, 1996, issued a notice and subpoena for the deposition of Mr. Smith in a different city (Indianapolis) and on a different date (July 22, 1996.) Resp. C.A. Br. 7; Pet. App. 4a; Pet. 3. These violations led to a flurry of

motions[2] and a hearing which was held on July 19, 1996.

> At the hearing, Cunningham argued that she should be excused for failing to comply with her discovery obligations both because the defendants had served 'contention' interrogatories, the answers to which allegedly depended on documents to be produced by the defendants and because her client had died and the new administrator of the Starcher estate was not returning her phone calls.

Pet. App. 24a.

Further, during that hearing "all counsel . . . were given the opportunity to argue the various matters raised by motions." Resp. C.A. Br. 8; Pet. App. 5a. Petitioner at no time stated that she needed more time to prepare for the hearing or present her arguments.

> Plaintiff's counsel appeared at the hearing and presented her argument on all the motions. She neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare.

Resp. C.A. Br. 8; Pet. App. 7a-8a.

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[2] *See* Resp. C.A. Br. 8, n.8, for a list of the motions which were filed.

Subsequently, inter alia, Magistrate Cook determined that Petitioner's conduct was "egregious", that she and the Estate had violated the Order of July 12, 1996, and that sanctions should be imposed:

> The Court considers the conduct of plaintiff's counsel to be egregious.

Resp. C.A. Br. 9; Pet App. 25a.

Importantly, the sanctions were imposed pursuant to Fed. R. Civ. P. 37(a)(4) and, not as a result of her having been held in contempt. Resp. C.A. Br. 9, n.9; Pet App.6a-7a, 11a; Pet. 4.

After receiving memoranda supporting and opposing the amount sought in sanctions, on September 25, 1996, Magistrate Judge Cook affirmed his decision to impose sanctions upon Petitioner, and found that she should pay CMS $2,432.00[3] and Respondent $1,494.00. Resp C.A. Br. 9 & 10; Pet. App. 8a; Pet. 4. Petitioner objected to these decisions, yet, the trial court overruled the objections, finding that "Ms. Cunningham's conduct clearly necessitated" the action taken by Appellees and ". . . sanctions were mandated." Resp. C.A. Br. 10; Pet. App. 11a; Pet. 4.

Throughout the above-described events Petitioner continued to refuse to voluntarily withdraw as the Estate's counsel. Resp. C.A. Br. 10. It was not until October 22, 1996 - after the original discovery deadline had already passed - that Petitioner was disqualified as the Estate's counsel.

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[3] Petitioner has separately settled this award with CMS.

> Accordingly, it is "obvious", for purposes of the Disciplinary Rules, that Ms. Cunningham ought to be called as a witness, and the Court ascribes no credibility to her equivocation concerning her intentions.

Resp. C.A. Br. 11; Pet. App. 16a. In addition, almost four months after Respondent and CMS' first attempt to take her deposition, Petitioner was ordered that she was to make herself available for deposition. Resp. C.A. Br. 11; Pet. App. 17a.

Petitioner appealed the sanctions order and on December 11, 1996, Respondent and CMS filed a joint motion to dismiss her appeal on the basis that the Sixth Circuit lacked jurisdiction to hear the appeal. On February 4, 1997, the Sixth Circuit denied the motion to dismiss on the basis that "[t]here is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable...(numerous citations omitted)..." Resp. C.A. Br. 13; Pet. App. 19a-20a; Pet. 5. Significantly, the Sixth Circuit made clear that "[i]n light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised" and directed the parties to address the court's jurisdiction in their briefs. Pet. App. 20a.

On May 21, 1998, the Sixth Circuit issued its Opinion in which it held that the trial court's Order of October 22, 1996, was not immediately appealable, and therefore the Court lacked jurisdiction to hear the appeal. Pet. App. 23a. On June 3, 1998, Petitioner filed a suggestion for rehearing en banc which was denied on August 5, 1998, and thereafter, Petitioner filed the within Petition for Writ of Certiorari on November 3, 1998. Pet. i, 1, 2 & 8. On October 9, 1997,

the underlying case was dismissed on the merits. R.187.

ARGUMENT

I. Introduction

At the outset, Respondent acknowledges the split in the Circuit Courts of Appeal regarding whether an interlocutory award of sanctions is immediately appealable and whether a non-party attorney (i.e., due to withdrawal or disqualification) may immediately appeal such an order.[4] Respondent submits that the Sixth Circuit correctly held that an interlocutory award of sanctions is not immediately appealable,[5] correctly applied 28 U.S.C. §1291, and correctly applied the collateral-order doctrine. Respondent respectfully submits that several Circuit Courts of Appeal have erred in their application of the collateral-order doctrine and therefore

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[4] See numerous cases cited and relied upon by Petitioner in her brief and accompanying footnotes, as well as Pet. App. 26a-32a.

[5] See, also, Appeal of Licht & Semonoff, 796 F.2d 564 (1st Cir.1986); Eastern Maico Distrib., Inc. v. Maico-Fahzeugfabrik, 658 F.2d 944 (3d Cir. 1981); Click v. Abilene National Bank, 822 F.2d 544 (5th Cir. 1987); Sanders Assoc., Inc. v. Summagraphics Corp., 2 F.3d 394 (Fed Cir. 1993); G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990); and Howard v. Mail-Well Envelope Co., 90 F.3d 433 (10th Cir.) *cert. denied*, 117 S.Ct. 84 (1996). ***But see*** numerous cases in other Circuit Courts of Appeals cited by Petitioner. Pet 5, 8-17 n.4-11.

certiorari is not warranted.[6] Respondent further submits that this is not a matter of great importance and that no compelling reasons exist to grant the Petition. Hence, Respondent requests this Court deny certiorari pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

II. The Sanctions Order Of October 22, 1996, Against Petitioner Is Not A "Final Decision" Under 28 U.S.C. §1291.

It is well settled that the Circuit Courts of Appeal have no jurisdiction other than that which is conferred upon them by statute. U.S. v. Walker, 915 F.2d 1463, 1465 (10th Cir. 1990). 28 U.S.C. § 1291, provides, in relevant part:

> The courts of appeal ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... (Emphasis added.)

In short, an appellate court has no jurisdiction of an appeal from a non-final decision of a district court, and, where an appellate court has been asked to review such a non-final decision, the appeal must be dismissed.

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[6] For example, some circuits have confused the impossibility of review (satisfying the third Cohen factor) with the mere inconvenience of monitoring the case to its conclusion. Pet. App. 32a (citing Howard, supra, at 436. *But See* Pet. 19 (numerous citations omitted.) Further, this Court has recognized "...that orders awarding attorney fees are appealable independent of the disposition of the merits of the underlying case. Pet. App 32a (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199-200 (1988)).

Accordingly, this Court has held that a "final decision" for the purpose of determining appellate jurisdiction is ordinarily defined as one which disposes of all the rights of all of the parties to an action. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-75, 101 S.Ct. 669, 673-674 (1981). Moreover, since the underlying lawsuit involved both multiple claims and multiple parties, the provisions of Fed. Civ. R. P. 54(b) are applicable.

Even a cursory review of the subject Order reveals that it neither fulfills the jurisdictional requirement for the Circuit Courts of Appeals as set forth in 28 U.S.C. § 1291, nor satisfies the definition of a "final decision" established by this Court in Firestone Tire & Rubber Co. v. Risjord, supra. In addition, while the Order clearly deals with "fewer than all of the claims or parties," it is also clear that it does not contain either the "express determination that there is no just reason for delay", or the "express direction for the entry of judgment", which are both required by Fed. Civ. R. P. 54(b) for the Order to be considered final and appealable. Furthermore, this Court has "...held that an order compelling the production of discovery materials is a non-appealable interlocutory order." Pet. App. 26a (citing Alexander v. United States, 201 U.S. 117 (1906)). Accordingly, the subject Order is not a "final" decision pursuant to 28 U.S.C. § 1291.

III. The Order Requiring Petitioner To Pay Sanctions Incurred As A Result Of Discovery Violations, Is Not Immediately Appealable Under The Collateral-Order Doctrine.

Petitioner asserts that she may take an immediate interlocutory appeal from the sanction order issued against her

on October 22, 1996, on the basis of the "collateral-order doctrine", announced by the United States Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In Cohen, this Court recognized as appealable a

> ...small class of interlocutory decisions which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated...

Cohen, supra, 69 S.Ct, at 1225-6.

This Court subsequently set forth three distinct requirements for the applicability of the Cohen collateral order doctrine: first, "the order must conclusively determine the disputed question;" second, the order must "resolve an important issue completely separate from the merits of the action;" and third, the order must be "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978). More recently, this Court has explained that the collateral-order doctrine "is best understood not as an exception to the `final decision' rule laid down in [28 U.S.C.] § 1291, but as a `practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, _, 114 S.Ct. 1992, 1995, 128 L.Ed.2d 842 (1994) (citations omitted).

Respondent submits that, because the subject Order does not meet either the second or the third requirements of the collateral-order doctrine, the collateral-order doctrine does

not apply to the Order of October 22, 1996.

Respondent concedes that the subject Order meets the first requirement of the collateral-order doctrine. However, it clearly does not meet the second requirement, in that the issue of sanctions against Petitioner is not an "important" issue, and it is not an issue "completely separate from the merits of the action."

With regard to the former, it must be remembered that the total amount owed to Respondent is $1,494.00. This sum is neither huge or oppressive. Further, the

> "...risk [of non-repayment by Appellees]...does not, without more, constitute irreparable harm sufficient to qualify an order for immediate review. The same risk is present to some degree in almost every order for sanctions where execution precedes review. *E.g., Evanson* [*v. Union Oil Co. of Calif.*, 619 F.2d 72 (Em. App. 1980), *cert. denied,* 449 U.S. 832, 101 S.Ct. 102, 66 L.Ed.2d 38 (1980)], *supra*, 619 F.2d at 74 (sanction of $60,000 not immediately appealable). To permit an interlocutory appeal in such cases would reverse the general rule of non-appealability. Indeed, only the exceptional order would escape immediate appellate scrutiny. Accordingly, we cannot read either *Cohen* or Section 1291 to confer on us jurisdiction to review order 1 at this time. [Footnote omitted.]

Eastern Maico Distrib., Inc., supra at 948; Resp. C.A. Br. 18.

Thus, it cannot be said that this is an "important" issue, nor can it be said that Petitioner has or will suffer any irreparable harm required for immediate review.

With regard to the requirement that the sanctions issue be "completely separate from the merits of the action", it clearly is not.[7] Although Petitioner claims that "[a] trial judge's decision to sanction an attorney depends upon the behavior of the attorney and not upon the merits of the parties' claims" the subject sanctions were levied against Petitioner as a result of Petitioner's misconduct as Plaintiff's counsel relating to discovery, and her failure to obey a court order relating to discovery. Resp. C.A. Br. 18; Pet. 18. Petitioner's "behavior" resulted in a delay in discovery. Indeed, as a direct result of her refusal to timely and properly answer propounded discovery, Respondent was forced to file a motion for extension of time to identify its expert witness(es). Further, in order to assess whether the trial court abused its discretion in levying the subject sanctions, the Court would have to consider the merits plaintiff's allegations against defendants, and then decide the importance of Petitioner's misconduct which led to her being sanctioned. Resp. C.A. Br. 18. In many ways, this case is substantially similar to Eastern Maico Distrib., Inc., supra, wherein the Court stated, at 658 F.2d 947:

> "...As to the second [Cohen] criterion, the discovery activity at issue here is not

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[7] It is important to note that some of the Circuit Courts which have held similar orders to be completely separate from the merits of the action "...have since recognized its significant potential for disruption of the trial process." Pet. App. 29. (numerous citations omitted).

> completely collateral to the underlying action. In order to address the question whether the documents requested by plaintiffs were truly relevant, we would have to consider the charges against the defendants and reach some conclusion as to the relative importance of the discovered material. *Cf. Evanson, supra,* 619 F.2d at 74 (sanction for failing to answer interrogatories truthfully is not collateral to main issue and therefore is not directly appealable); *Borden Co.* [*v. Sylk*, 410 F.2d 843 (3d Cir. 1969)], *supra*, 410 F.2d at 846 (challenge to discovery order on relevance grounds is clearly not collateral to substantive litigation)..."

Hence, it is patently obvious that an immediate appeal would cause disruption of the underlying litigation and further inefficiency which would undoubtedly result in even more delays of the underlying case, further frustrating the rights of the litigants to have the merits of the case resolved. Therefore, the Order of October 22, 1996 fails to meet the second requirement of the collateral-order doctrine.

Petitioner knew that she was a key fact witness for plaintiff which resulted in her disqualification. Yet, Petitioner argues that "... attorney sanctions orders cannot be analogized to orders disqualifying counsel..." because "[a]ppeals of disqualification orders directly affect the ongoing district court litigation..." Pet. 20. (citing Richardson-Merrell, Inc., v. Koller, 472 U.S. 424, 431 (1985.) However, the sanctions issue in this case is obviously inextricably intertwined with the merits of underlying action and Petitioner's argument that due to her disqualification, an appeal in this circumstance "...cannot interfere with ongoing district court proceedings"

is incorrect. Pet. 20. As stated above, Petitioner's conduct did in fact interfere with the ongoing district court proceedings. Additionally, because Petitioner was a key fact witness, she had a continuing interest in and connection to the underlying case. Thus, as the Sixth Circuit stated, "...it would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself." Pet. App. 31a (citing Richardson-Merrell, Inc. supra.)

With regard to the third requirement of the collateral-order doctrine, Respondent submits, the most relevant and persuasive authority, is the case of Howard, supra. In Howard, Petitioner, who had been counsel for plaintiff, was sanctioned for misconduct and removed from the underlying district court action prior to appealing from the order by which he was sanctioned and removed. Further, in Howard, the underlying civil action was still pending in the district court at the time of the appeal, and there was "...no difficulty concluding the order challenged in this case does not amount to a `final decision[ ] of the district[ ] court' within the meaning of 28 U.S.C. § 1291..." Id., at 436; Resp. C.A. Br. 19.

The Howard Court went on to conclude that the collateral-order doctrine did not apply and that it lacked jurisdiction over the appeal because the order appealed from failed to meet the third requirement of the doctrine, i.e., the order was not effectively unreviewable absent an interlocutory appeal. Id. The Court found this to be true for three reasons, each of which applies with equal validity in this case. First, the challenged decision "...may be effectively reviewed in an appeal from a final judgment, even if the parties settle their dispute or otherwise elect not to appeal...". Second, the

rationales underlying the conflicting decisions from the other Circuit Courts of Appeals are faulty because "...an attorney may appeal a sanction or disqualification order even if his former client settles or does not appeal..."[8], and those other

> ...circuits' analyses improperly blur the line between the impossibility of effective review necessary under the Cohen doctrine and mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal....

And third, "...the mere fact the sanction order in this case is currently due in full does not give rise to the type of irreparable harm justifying review under the collateral-order doctrine..." Id., at 436-7. The Howard Court went on to observe:

> ...We see no reason to create an exception to this general rule and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in *G.J.B & Assocs.* [v. *Singleton*, 913 F.2d 824 (10th Cir. 1990)]. We also see no reason to permit an immediate appeal under *Cohen* so that Mr.

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[8] Petitioner's argument regarding settlement agreements and conflicts of interest are ill-founded because an attorney owes a duty to act in his/her client's best interest first and foremost. Pet. 18-19, nn.12-13.

> Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision. Mr. Smith's interest in promptly diminishing the stigma associated with the district court's decision is no greater than Mr. Dickstein's... Id., at 437.

(See also United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992) - revocation of permission to appear *pro hac vice* in a criminal case is not immediately appealable.)

Respondent respectfully submits that the Howard Court's reasoning is a sensible and valid analysis, and is applicable to Petitioner's misconduct in this case as it was to the misconduct in Howard. There simply is no good, valid or compelling reason to allow Petitioner an immediate appeal of the monetary sanctions levied for her "egregious" misconduct committed during the time she wrongfully, knowingly and tenaciously chose to maintain her flagrantly impermissible dual status as trial counsel and fact witness for plaintiff. Thus, because the order appealed from herein clearly does not meet the third requirement of the collateral-order doctrine (i.e., it is not effectively unreviewable absent an interlocutory appeal), it is not appealable under that doctrine. Resp. C.A. Br. 20.

IV. Petitioner Did Not File A Notice Of Appeal From The Order Dismissing The Underlying Case Even Though She Was Aware That The Sixth Circuit Court Of Appeals Could Dismiss Her Immediate Interlocutory Appeal For Lack Of Jurisdiction And She Is Therefore Not

Entitled To Have An Additional Opportunity To Obtain Appellate Review.

Petitioner failed to file any notice of appeal from the order of October 9, 1997 dismissing the underlying case. Therefore the Sixth Circuit was without jurisdiction to review the order levying attorney's fees. Pet. App. 23a. In fact, the Sixth Circuit stated that "...the mere fact that she may be unable to obtain appellate review does not enter into our jurisdictional analysis. Pet. App. 27a. Petitioner, in her questions presented for review, suggests that because the "...ruling below announced a new rule of appealability..." the court's decision should be applied prospectively. Pet. i. Yet, regardless of whether a new rule of appealability was announced, the failure to file a notice of appeal did not give the court jurisdiction to review the merits decision. Budinich, supra, at 203 (numerous citations omitted.)[9]

Importantly, Petitioner was aware of the distinct possibility that her appeal could be dismissed for lack of jurisdiction and still failed to file a notice of appeal from the order dismissing the underlying case. Specifically, in their February 4, 1997, Order, the Sixth Circuit Court of Appeals explicitly stated that "[i]n light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised...The parties are directed to address the court's jurisdiction in their appellate briefs." Pet. App. 20a. Clearly, at that time and while the underlying case was

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[9] Budinich held that "a decision on the merits is a 'final decision' for purposes of §1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." Id. 202-203.

still pending, Petitioner was undoubtedly on notice of the distinct possibility that her appeal could be dismissed for lack of jurisdiction.

Furthermore, the Sixth Circuit's decision did not produce any inequitable results in this case. Specifically, although Petitioner was disqualified she continued to be involved in the matter. Specifically, on July 7, 1997, Petitioner filed a motion by which she requested the district court judge to recuse herself in the determination of subsequent sanctions. R.174. Additionally, in November, 1996, Petitioner's deposition as a fact witness in the underlying case was taken.[10] Lastly, from February 11, 1997, until March 23, 1998, Petitioner actively litigated the issue of whether additional monetary sanctions would be imposed on her. On March 23, 1998, the trial court having found among other sanctionable conduct that Petitioner had "perpetuated a fraud upon the Court...," imposed monetary sanctions in the amount of $29,000.00.[11] R.200.

Clearly, Petitioner was still actively involved in the case both as a lawyer when she filed a recusal motion and fought against the imposition of additional sanctions, and as a fact witness for the Estate. Accordingly with the actual knowledge that the possibility that her appeal could be dismissed and familiarity with the status of the underlying case, Petitioner knew or should have known that in order to

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[10] See Response of Appellees Correctional Medical Systems, Inc. To Suggestion For Rehearing En Banc and Respondent's motion adopting said response. Resp. 3-5.

[11] The sanctions award in the amount of $29,000.00 imposed upon Petitioner were awarded to CMS only and a satisfaction of judgment has since been entered. R. 217.

protect herself, a notice of appeal of the Order dismissing the underlying case had to be filed. Therefore, she cannot, at this late date, complain that she has no avenue for appellate review even if "...the ruling below announced a new rule of appealability...", nor may she complain that this has led to an inequitable result in this case. Thus, it is distinguishable from the holding in G.J.B. & Assoc., Inc., supra., where the Tenth Circuit did not allow its holding to apply retroactively.

V. Several Circuit Courts Of Appeal Have Erred In Their Application Of The Collateral-Order Doctrine And Therefore Certiorari Is Not Warranted.

Petitioner has cited to numerous cases demonstrating the split among the Circuit Courts of Appeals and their treatment regarding whether an interlocutory sanction award is immediately appealable.[12] However, of the circuits which permit immediate appeals, the Second, Seventh, Eighth and Ninth,

> ...some of those circuits that initially embraced the idea that an attorney could immediately appeal an order imposing discovery sanctions have since recognized its **significant potential for disruption of the trial process.** The Second Circuit, for example, recently noted that its precedent permitting attorneys immediately to appeal sanctions orders led to a 'flurry of arguments, charges and countercharges...that effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying

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[12] See Pet. 5, 8-17 n.4-11.

> ...litigation." Pet. App. 29a (citing Ted Lapidus, S.A. v. Vann, 112 F.3d 91, 96 (2nd Cir. 1997)). (Emphasis added.) In light of the practical effects of its precedent, the court went so far as to say that '[w]ere we writing on a clean slate, we would be tempted to confine *Cheng*[13] to its unusual facts and characterize the sanctions order here as nonappealble under the *Cohen* doctrine.' *Ibid.* Similarly, the Seventh Circuit recently acknowledged that its precedents permitting immediate appeals by sanctioned attorneys 'ha[ve] not played to universal acclaim,' and noted that extension of these precedents 'would produce a substantial and unjustified, erosion of the final-decision requirement.

Pet. App. 29a. (citing Cleveland Hair Clinic, Inc. v. Puig, 104 F.3d 123, 125 (7th Cir. 1997)).

Moreover, Respondent submits that Petitioner's sanction herein, $1494.00, is neither huge nor oppressive and is not an "important" issue under Cohen. Thus, Petitioner would arguably not be permitted to file an immediate appeal in the Eleventh Circuit.

Additionally, due to Petitioner's continued interest in and connection to the underlying case, she would arguably not have been permitted to file an immediate appeal in either the Fifth or Third Circuit Courts of Appeals.

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[13] Cheng v. GAF Corp., 713 F.2d 886 (2nd Cir. 1983).

CONCLUSION

Clearly, the order imposing sanctions against Petitioner is neither a final decision of the trial court pursuant to 28 U.S.C. §1291, nor under case law interpreting §1291, nor a decision to which the collateral-order doctrine applies. As such, it was taken in violation of 28 U.S.C. §1291, Fed.R.Civ.P. 54 and relevant and well established case law.

Additionally, a broad rule permitting interlocutory appeals of sanctions awards will encourage piecemeal litigation and inevitably delay the trial proceedings. It would further serve to reward attorneys for egregious conduct by granting them rights not granted to those attorneys who conduct themselves properly. For example, in this case, Petitioner was sanctioned on more than one occasion.

> In complicated multiple party cases, the potential exists for repeated sanctions over an extended period of time, each one of which could result in an immediate appeal...strict adherence to the requirements of 28 U.S.C. §1291 will have the collateral effect of reinforcing the necessary deference to the trial court's broad discretion in managing cases, including the imposition of sanctions. Attorneys...will be fully aware that they must bear the burden of sanctions to the conclusion of the case...

D & H Marketers v. Freedom Oil & Gas, 744 F.2d 1443, 1446 (10th Circuit 1984)(en banc).

> Indeed, it would be ironic to allow an appeal from a sanction order, inevitably delaying

> lower court proceedings, when that order may have resulted from tactics that already unjustifiably delayed the proceedings.

G.J.B. & Associates, Inc. supra.

Further, expanding the collateral-order doctrine to include immediate interlocutory appeals from sanction orders would undoubtedly make the trial process more about the attorneys rather than the litigants whom the attorneys represent. There is simply

> ... no reason to create an exception to this general rule and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary....

Howard at 437.

Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/_____
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PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

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Supreme Court, U.S.
FILED
FEB 26 1999
CLERK

(3)

No. 98-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 3, 1998
PETITION FOR CERTIORARI GRANTED JANUARY 15, 1999

578P

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RELEVANT DOCKET ENTRIES

1	9/19/95	COMPLAINT & JURY DEMAND
2	9/25/95	ORDER by Judge Sanda S. Beckwith Case referred to Mag. Judge Robert A. Steinberg
3	11/13/95	ANSWER by defendants Med Corrections Sys, Sally Remilard and Joseph Spriggs; jury demand
4	11/17/95	ANSWER by defendants Hamilton County OH and Simon Leis; jury demand
5	2/15/96	ORDER by Judge Sandra S. Beckwith Case referred to Mag Judge Lynn V. Hooe
10	7/1/96	MOTION by defendant Med Corrections Sys to compel the Estate to respond in full to CMS 1st set of interrogatories, and to extend time to ID Expert Witnesses
18	7/9/96	MOTION by defts Med Corrections Sys, Sally Remilard and Joseph Spriggs to disqualify Teresa Cunningham as counsel for pltf
20	7/9/96	MOTION by defts Hamilton County OH and Simon Leis to disqualify Teresa Cunningham as counsel for pltf
26	7/12/96	ORDER by Mag Judge James Cook. In re: motion to disqualify Brian Hurley as counsel for Joseph Spriggs [25-1] dft to file response by 7/29/96 and pltf to reply by 8/9/96; granting in party and denying in part motion for protective order [24-1], denying motion to quash subpoena [24-2]; in re: motion for order

that it may call Joseph Rowan as an expert witness [21-1] dfts to file resonse [sic] by 7/17/96 and pltf to reply by 7/22/96; granting motion to extend time for pltf to ID expert witnesses [21-2], denying motion to disqualify Teresa cunningham as counsel for pltf [20-1], granting in part and denying in part motion for protective order [19-1], granting in part and denying in part motion for protective order [17-1], granting motion for order vacating defts expert witness identification ddl of 7/19/96 [16-1], granting motion to compel the Estate to respond in full to CMS 1st set of interrogatories [10-1], granting motion to extend time to ID Expert Witnesses [10-2]

27 7/16/96 NOTICE by Magistrate Cook of Follow up hearing regarding order of Court on 7/12/96 set for 10:00 am on 7/19/96

28 7/16/96 MOTION by plaintiff to compel defts. J. Spriggs & S. Remilard to appear for depo on 7/25/96, to depose Rex Smith in Indianapolis, and for sanctions

29 7/16/96 NOTICE by plaintiff of taking deposition of Rex Smith on 7/22/96 at 4 pm

30 7/16/96 MOTION by defendant Hamilton County, OH, defendant Simon Leis for protective order, and for sanctions

31 7/17/96 MOTION by defts Med Corrections Sys, Sally Remilard and Joseph Spriggs for protective order, and for sanctions

32 7/17/96 MOTION by defendant Med Corrections Sys to enforce order of 7/12/96, and for sanctions

34 7/17/96 MOTION by defendants to quash subpoena issued to Rex Smith for depo on 7/22/96

37 7/19/96 CIVIL MINUTES: Proceeding before Mag Judge James Cook on various motions; Teresa L. Cunningham present for pltf; Brian Edward Hurley, Philip Lewis Zorn, Jr. & Shannon M. Reynolds present for dfts; Pltfs counsel requested motion be granted to depose Rex Smith in Indianapolis, IN; Defts counsel, Messrs Hurley & Zorn, requested Court order of 7/12/96 be enforced and sanctions be granted against pltfs counsel for failure to comply with Court's order; Pltf's counsel directed to serve suppl answers to first set of Interragatories [sic] within 10 days of today's hearing; Sanctions granted against pltfs counsel Dfts counsel to submit cost and charges for appearance and preparation of hearing to Court for ruling; Depos of Rex Smith, Joseph Spriggs & S. Remilard to go forward as agreed to by parties as such place as appropriate

38 7/22/96 ORDER by Mag Judge James cook denying motion to compel defts J. Spriggs & S. Remilard to appear for depo on 7/25/96 [28-1], denying motion for sanctions [28-3] granting motion for protective order [30-1] granting motion for protective order [31-1] granting motion to enforce order of 7/12/96 [32-1] granting motion to quash subpoena issued to Rex Smith for depo on 7/22/96 [34-1] granting motion for sanctions [30-2],

granting motion for sanctions [31-2], granting motion for sanctions [32-2]

54 8/2/96 OBJECTIONS by plaintiff to Magistrate Cook's 7/19/96 Order (not yet filed with Court)

63 8/6/96 MOTION by defendant Med Corrections Sys, defendant Sally Remilard, defendant Joseph Spriggs to disqualify Teresa Cunningham

77 8/22/96 ORDER by Mag Judge James Cook denying motion to disqualify Teresa Cunningham as counsel for pltf [18-1]

88 9/12/96 MOTION by defendants Hamilton County OH and Simon Leis to disqualify Teresa L Cunningham as counsel for pltf

94 9/20/96 ORDER by Mag Judge James Cook that the response to County defts Second Motion to Disqualify Teresa Cunningham as counsel for pltf [88] shall contain statement informing Court whether she intends to continue as counsel for pltf or be a witness at trial for pltf and defining status of Douglas Marr Mansfield in this case

99 9/25/96 ORDER by Mag Judge James Cook that pltf's counsel pay to Crabbe, Brown, Potts & Schmidt, Cinti OH counsel for defts Correctional Medical Systems Inc, Remillard and Spriggs the sum of $2,432 as costs & Atty fees in re hearing on 7/19/96 (Doc. 37) and order on 7/22/96 (doc. 38); pltf's counsel pay to Treasurer, Hamilton Co OH the sum of $1,494 in costs and atty fees incurred by

Prosecuting Atty, Hamilton Co OH as counsel for defts in re hearing on 7/19/96 (Doc 37) and the order of 7/22/96 (Doc. 38); pltf's counsel's request for a stay of this order pending appeal is denied.

109 10/7/96 MEMORANDUM by plaintiff in opposition to motion to disqualify T. Cunningham as counsel for pltf [88-1]

110 10/7/96 OBJECTIONS by plaintiff to Magistrate's Order of 9/25/96 [99-1]

110 10/7/96 MOTION by plaintiff for expedited hearing, and to stay payment of sanctions pending appeal

114 10/9/96 AMENDED COMPLAINT by plaintiff; jury demand adding Kathy Brown as pltf

127 10/22/96 ORDER by Judge Sandra S. Beckwith affirming the decision of the Magistrate Judge dated July 19 September 5 September 25 and September 30 documents [38-1] [85-1] [86-1] [99-1] [105-1] are affirmed; granting motion to disqualify Teresa Cunningham as counsel for pltf [88-1] denying motion to strike motion to disqualify Teresa Cunningham [63-1] [67-1] denying motion for protective order [106-1], denying motion to quash [106-2], denying motion for sanctions [106-3] denying motion for further sanctions [73-1], denying memorandum [73-1] denying motion for sanctions [74-1], denying memorandum [74-1]; defendants may take deposition of Teresa Cunningham on or before October 31, 1996. Ms Cunningham is directed to attend

deposition scheduled by defendants and defendants are instructed to consult with Ms Cunningham in order to identify a mutually agreeable time and date for the deposition. Ms Cunningham is advised to respond to questions posed to her at such a deposition unless she is unable to do so in light of the attorney-client privilege. Dispositive Motions may be filed on or before November 4, 1996. Opposing memorandum must be filed and served, via hand delivery or facsimile on or before November 19, 1996. Reply memorandum must be filed and served, via hand delivery or facsimile on or before November 29, 1 996 [sic]. The Court will conduct the final pretrial conference in this matter as scheduled on December [sic] 1996

133 11/1/96 MOTION by movant Teresa Cunningham to stay collection of sanctions pending appeal

134 11/1/96 NOTICE OF APPEAL by movant Teresa Cunningham from Dist. Court decision [127-1] of 10/22/96

138 11/7/96 CIVIL MINTUES: Hearing on motions (133 & 136) held before Judge Sandra S. Beckwith. Lou Sirkin & Laura Abrams enter appearance on behalf of Ms. Cunningham. Arguments held. Re: doc. 136; defts. Are to specify docs. Requests. Pltf. is to produce or assert privilege. The Court will review privileged docs. In camera (pltf. must provide a privilege log). Re: doc. 133: A stay is GRANTED pending conclusion of this case and any appeal.

142 11/22/96 Deposition of Theresa [sic] Cunningham with SEALED EXHIBITS ATTACHED taken 11/8/96 by pltf

148 12/9/96 CIVIL MINUTES: Hearing before Judge Sandra S. Beckwith on motion to withdraw as attorney [147-1] and motion to extend time to respond to defts motion for summary judgment [146-1]; Pltf indicated attorney Mr Newman to review file by 12/11/96 & report whether he will appear on behalf of pltf's in substitution of attorney Mansfield; Deft represented by attorney Hurley requested that case be dismissed with prejudice; Pltf's motion to dithdraw [sic] (Doc. 147) is granted; defts request fees for all matters concerning MS [sic] Cunningham; Court instructs deft to file motions for sanctions should they choose to do so; defts do not intend to file a response to doc 146 or a further response in support of motion to dismiss. FPTC & Trial dates are vacated.

187 10/9/97 ORDER by Judge Sandra S. Beckwith granting motion for summary judgment [142-1] by defendants Correctional Med Sys, Sally Remilard, and Joseph Spriggs as to Counts I and II of the amended complaint, granting motion for summary judgment [143-1] by defendants Hamilton County OH, and Simon Leis as to Counts I and II of the amended complaint, Defts motions for summary judgment with respect to Counts III, IV, and V of the amended complaint are deemed moot and pltfs state law claims are dismissed without prejudice, finding the motion to strike appendix to pltfs memo in opposition to defts

for summary judgment [169-1] moot[], finding the motion to dismiss case with prejudice [185-1] moot.

190 11/7/97 NOTICE OF APPEAL by plaintiff from Dist. Court decision [187-1] of 10/9/97

198 12/4/97 ORDER OF US COA 6th Circuit dismissing the appeal [190-1] for want of prosecution

200 3/23/98 OPINION AND ORDER by Judge Sandra S. Beckwith granting motion for monetary sanctions [Doc. 118]; Ms Teresa Cunningham directed to pay CMS $29,000.00 in the form of certified check or money order by 4/30/98; Clerk directed to enter judgment against Ms Cunningham and close this case terminating case

201 3/23/98 JUDGMENT by CLERK entered against Ms Teresa Cunningham pursuant to Order of the Court [Doc. 200] in the amount of $29,000.00 made payable to CMS in the form of a certified check or money order payable to CMS's counsel on or before 4/30/98

202 4/21/98 NOTICE OF APPEAL by movant Teresa Cunningham from Dist. Court decision [201-1] of 3/23/98

204 5/8/98 MOTION by movant Teresa Cunningham to stay enforcement or collection of judgment pending appeal of judgment

211 7/22/98 ORDER by Judge Sandra S. Beckwith denying motion to stay enforcement and or

collection of judgment pending appeal of judgment [204-1]

213 7/30/98 ORDER OF USCA 6th: that motion to reinstate appeal is granted

214 8/14/98 MANDATE OF USCA 6th: dismissing the appeal [202-1]

215 8/3198 ORDER OF US COA 6th Circuit dismissing appeal [Doc. 202] pursuant to notice of voluntary dismissal filed by parties

216 9/23/98 NOTICE of Satisfaction of Judgment against Teresa Cunningham by defts Correctional Med Sys, Sally Remilard, and Joseph Spriggs [201-1]

217 9/24/98 SATISFACTION OF JUDGMENT against Teresa Cunningham [201-1]

219 1/26/99 LETTER to Court from Supreme Court of The United States[]; Petition or a writ of certiorari is granted limited to question one presented by the petition

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN LEE STARCHER,
Plaintiff
vs Case No. C-1-95-815
MEDICAL CORRECTIONS (Beckwith, J.)
SYSTEMS, INC. et. al
Defendants

ORDER

This matter is before the Court on plaintiff Darwin Lee Starcher's motion to compel and for sanctions (Doc. 28), defendant Hamilton County, Ohio's second motion for protective order and for sanctions (Doc. 30), defendants Medical Correction Systems (CMS), Remilard, and Spriggs' motions for protective order and to enforce (Docs. 31, 32), and defendants' joint motion to quash (Doc. 34). This Court held a hearing on these motions on July 19, 1996. After reviewing the record and hearing arguments by the parties, the Court hereby ORDERS the following:

1) that plaintiff's motion to compel and for sanctions (Doc. 28) is DENIED;
2) that defendant Hamilton County's motion for protective order prohibiting the deposition of Rex Smith noticed for July 22, 1996 in Indianapolis, Indiana (Doc. 30) is GRANTED such that the deposition will not go forward;
3) that defendants CMS, Spriggs, and Remilard's motion for protective order to prohibit Rex Smith's deposition noticed for July 22, 1996 in Indianapolis, Indiana (Doc. 31) is GRANTED and their motion for protective order to prohibit

the depositions of Spriggs and Remilard noticed for July 25, 1996 is GRANTED;
4) that defendants CMS, Spriggs, and Remilard's motion to compel full and complete responses to defendants' first set of interrogatories and request for documents (Doc. 32) is GRANTED; and
5) that defendants' joint motion to quash the subpoena requiring Rex Smith to appear for deposition on July 22, 1996 in Indianapolis, Indiana (Doc. 34) is GRANTED.

Plaintiff is FURTHER ORDERED to serve supplementary answers to defendants' first set of interrogatories and request for documents WITHIN TEN DAYS of the date of the hearing on this matter.

The depositions of defendants Remilard and Spriggs shall go forward no sooner than THIRTEEN days after plaintiff has served defendants with the above-ordered supplementary responses. The depositions of defendants Spriggs and Remilard are to be scheduled by agreement of the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure. The deposition of Rex Smith may go forward on a date and in a place agreed upon by the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure.

Because the Court finds that plaintiff has effectively violated this Court's order of July 12, 1996, defendants' motions for sanctions are GRANTED. Within THIRTY DAYS counsel for defendants are to submit to the Court appropriate statements indicating their reasonable fees and expenses for their court appearance on these motions and their preparation for today's hearing. Defendants shall serve copies

of these statements on plaintiff. The Court will consider these statements before ruling upon the sanctions to be imposed.

SO ORDERED.

Date: [7-19-96]
James F. Cook
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN STARCHER,
Plaintiff
vs Case No. C-1-95-815
MEDICAL CORRECTIONS
SYSTEMS, INC. et. al,
Defendants J. Beckwith

ORDER

This Order addresses the imposition of sanctions in the form of reasonable expenses, including attorney's fees, to be imposed against plaintiffs' counsel in regard to the hearing that was conducted before the undersigned on July 19, 1996. In this ruling the Court will determine the amount of such expenses to which defendants are entitled. A review of the record leading up to the July 19th hearing is appropriate.

An informal discovery conference was held by the undersigned with all counsel on July 10, 1996 and resulted in the entry of a formal order dated July 11, 1996 and entered on July 12, 1996. (Doc. 26). This order directed, *inter alia*, that the plaintiff make full and complete responses to defendants' First Set of Interrogatories and Document Requests by 4:00 p.m. on July 12, 1996; that certain depositions, including that of Rex Smith, be taken on July 25, 1996; and that the depositions of defendants Remillard and Spriggs go forward on July 25, 1996 only if plaintiff had made full and complete responses to defendants' First Set of Interrogatories and

Document Requests by 4:00 p.m. on July 12, 1996. It should be noted that plaintiff's counsel was advised of and understood the July 12th , 4:00 p.m. deadline at the conference on July 10th.

On July 16, 1996, plaintiff filed a Motion to Compel Defendants Spriggs and Remillard to Appear for Depositions on July 25, 1996, to Depose Rex Smith in Indianapolis, Indiana and for Sanctions. (Doc. 28). It is argued in this motion that plaintiff complied with the July 12th, 4:00 p.m. deadline on responses to the defendants' Interrogatories and Requests for Production of Documents, yet defendants Spriggs and Remillard, by their attorney, have stated that they will not appear for their depositions; and that Rex Smith was located in Indianapolis and that he would be unavailable for his deposition in Cincinnati on July 25th, that his deposition had, therefore, been rescheduled by plaintiff's counsel for July 22nd in Indianapolis and a subpoena issued by plaintiff's counsel to that effect. Sanctions against defendants Spriggs and Remillard were sought for their alleged failure to obey the July 12th order.

A Notice to Take Deposition was issued by plaintiff's counsel on July 15th noticing the deposition of Rex Smith in Indianapolis on July 22nd. (Doc. 29).

On July 16, 1996 the County Defendants filed a Second Motion for Protective Order and for Expenses, Fees and Sanctions. (Doc. 30). The grounds for the motion are that the action of plaintiff's counsel in scheduling the Smith deposition in Indianapolis on July 22nd was a violation of the Court's July 12th order which directed that the deposition be taken on July 25th, that it was the clear understanding of all counsel that the deposition would be taken on that date in plaintiff's counsel's office in Cincinnati. Also, it was alleged that the subpoena issued to Smith was not valid in that it was issued out of this Court rather than the U.S. District court in Indianapolis.

Expenses including attorney's fees were requested pursuant to F.R. Civ. P. 26(c) and 37(a)(4).

The CMS, Remillard and Spriggs Defendants also filed a Motion for Protective Order and Sanctions. (Doc. 31). This motion was filed on July 17, 1996 and sought a protective order prohibiting the taking of the Smith deposition on July 22nd and the taking of the Remillard and Spriggs depositions on July 25th. The grounds for the motion are that the unilateral action of plaintiff's counsel in noticing the Smith deposition for July 22nd in Indianapolis violated the Court's July 12th order, and that plaintiff's responses to the First Set of Interrogatories and Document Requests were not full and complete in violation of the July 12th order so that the depositions of Remillard and Spriggs should not go forward on July 25th. The legal expenses and costs of these defendants incurred in bringing the motion were sought.

Also on July 17, 1996 the CMS Defendants filed a Motion to Enforce Order and for Sanctions. (Doc. 32). By this motion these defendants asked for an order compelling compliance with the July 12th order relating to plaintiff's responses to the defendants' Interrogatories and Document Requests and for reasonable expenses, including attorney's fees in obtaining such order.

All defendants filed a joint motion on July 17, 1996 to quash the subpoena issued to Rex Smith for his deposition on July 22nd in Indianapolis (Doc. 34), basically on the same grounds as set forth in the other motions filed in connection therewith.

The defendants, respectively, filed responses to the plaintiff's Motion to Compel which is noted above. (Doc. 35 and 36).

In view of the apparent urgency of these motions the Court scheduled them for hearing on July 19, 1996 and did conduct such hearing on that date. All counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record. (Doc. 47).

The undersigned made the following rulings on the motions: the plaintiff's Motion to Compel was denied; the motion of the County Defendants for a protective order prohibiting the deposition of Rex Smith at Indianapolis on July 22nd was granted; the motion of the CMS Defendants was also granted in that respect and prohibiting the taking of the depositions of defendants Remillard and Spriggs on July 25th; the motion of the CMS Defendants and Remillard and Spriggs requiring plaintiff to serve full and complete answers to the defendants' First Set of Interrogatories and Request for Documents was granted as was the defendants' joint motion to quash the Smith subpoena.

Further directives for the serving of supplemental responses by plaintiff to the interrogatories and document requests were included in the order, as well as for the taking of the depositions of defendants Remillard and Spriggs and the witness Rex Smith.

The Court concluded that plaintiff's counsel had not complied with the July 12th order, but had violated same. The motions of the defendants for protective order and sanctions were granted and counsel were directed to submit to the Court their respective statements of charges and costs that were necessitated by filing their motions and attending the hearing. (Doc. 38 and 47).

The authority for the action taken by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants' motions for protective orders were granted after a

hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

The CMS, Remillard and Spriggs defendants have filed a Memorandum and Statement Supporting Amount Sought in Sanctions. (Doc. 46). The County Defendants have also filed a similar Memorandum, Statement and Affidavit Supporting Amount Sought as Sanctions. (Doc. 50). Plaintiff has filed a responsive Memorandum to each of these papers. (Doc.s [sic] 52, 53). The CMS Defendants have filed a Reply (Doc. 55) and a Motion to Strike (Doc. 56). The County Defendants have filed a Reply. (Doc. 72).

The Memorandum of Defendants CMS, Remillard and Spriggs (Doc. 46) sets out a claim in the total amount of $2928.00, which is calculated on the basis of 14.3 hours of work from July 12, 1996 through July 22, 1996 as follows:

Brian E. Hurley	13.90 hrs. at $200=	2780.00
Kathy McGarvey Hidy	.40 hrs. at $140-	56.00
Total Fees:		$2836.00
Also included are:	Copying Costs	85.40
	Postage	6.60
	Total Expenses:	92.00
	Grand Total:	$2928.00

The affidavit of Brian E. Hurley provides a breakdown of the attorney's hours claimed in this matter and identifies the character of the work performed. Mr. Hurley and Ms. Hidy are private practitioners.

The Memorandum of the County Defendants (Doc. 50) sets out their claim in the total amount of $1,690.50 which is calculated on the basis of 11.27 hours of work from July 15, 1996 through July 24, 1996 by attorney Philip L. Zorn, Jr., at $150.00 per hour. An affidavit of Mr. Zorn is attached which provides a breakdown of the hours and character of the work performed. Mr. Zorn is an Assistant Prosecuting Attorney for Hamilton County, Ohio.

Plaintiff's responses (Doc. 52 and 53) set forth objections to the Court's order of sanctions and award of attorney's fees and to the amounts claimed by defendants' counsel, respectively. It is argued that plaintiff's counsel was denied due process because she didn't have adequate time to prepare a defense; that the time claimed by Attorney Hurley is exaggerated; that the defendants' motions are duplicative; that the hourly rate claimed by Attorney Hurley is excessive; that the time claimed by Attorney Zorn is exaggerated and that the hourly rate claimed by Attorney Zorn is excessive.

Having carefully considered the matters now before the Court and the papers filed with regard thereto, it is the opinion and finding of the undersigned that the defendants are entitled to recover forthwith the amounts, with certain adjustments, claimed by them as reasonable expenses including attorney's fees incurred in relation to the motions brought before the Court on July 19, 1996. The Court finds that plaintiff's attorney's conduct necessitated the preparation and filing of the defendants' motions and responses to plaintiff's motion and necessitated the hearing on July 19, 1996. Further, the Court finds that the objections relied upon by plaintiff in the responses (Doc. 52, 53) are not well taken and do not provide a

basis for relief from the sanctions ordered by the Court. As just indicated, however, certain adjustments will be made in relation to the amounts claimed.

The July 19th hearing was not a contempt hearing and plaintiff's counsel was not found to be guilty of contempt. The defendants' motions for a protective order were heard pursuant to Rule 26(c), F.R. Civ. P. and the sanctions were imposed pursuant to Rule 37(a)(4), F.R. Civ. P. Plaintiff's counsel appeared at the hearing and presented her argument on all the motions. She neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare.

The schedule of hours submitted by counsel for the CMS, Remillard and Spriggs defendants (Doc. 46, p. 2) will be revised by the Court to eliminate the first two items dated July 12, 1996 and July 15, 1996, respectively. The activity described therein would appear to have been necessary in the ordinary course of reviewing the discovery matters then under consideration. The .40 hours and 2.20 hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total number of hours for which payment is to be made is 11.70 hours. The hourly rate of $200.00 for Mr. Hurley appears reasonable and will be allowed. Accordingly, the amount of payment to be made to counsel for these defendants attorney's fees is $2,340.00. The expenses in the amount of $92.00 are allowed, making a total payment of $2,432.00.

Also, the schedule of hours submitted by counsel for the County defendants (Doc. 50, pp. 6-7) will be revised by the Court to eliminate those items listed under the date of July 15, 1996. That activity would likewise appear to have been necessary under the existing circumstances. The total of 1.31

hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total amount of hours for which payment is to be made is 9.96 hours. The hourly rate of $150.00 for Mr. Zorn appears reasonable and will be allowed. The total amount of payment to be made as attorney's fees for the County Defendants is $1,494.00.

The argument of plaintiff's counsel that the services of counsel for the defendants, respectively, are duplicative is misplaced. There are two distinct sets of defendants, each represented by separate attorneys. Each of those attorneys was entitled to proceed in such manner as would best represent his defendants with respect to the serious discovery dispute that had developed. Each of these attorneys did, it is not surprising, proceeding a similar manner pursuant to the Federal Rules of Civil Procedure. That they filed similar motions on similar grounds is not surprising either, and does not, in the opinion of the Court, constitute duplication of work for which compensation should not be made. Inasmuch as the conduct of plaintiff's counsel created the dilemma with which the defendants' attorneys were faced, it is not a detraction from their work effort that they may have conferred in relation to the course of action to be taken.

Plaintiff's counsel requests s [sic] stay of this order pending an appeal. That request will be denied. The Court considers the conduct of plaintiff's counsel to be egregious.

Accordingly, It Is Ordered that:

1. Plaintiff's counsel forthwith pay to Crabbe, Brown, Potts & Schmidt, Cincinnati, Ohio, counsel for defendants Correctional Medical Systems, Inc., Remillard and Spriggs, the sum of $2,432.00 as costs and attorney's fees in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc. 38).

2. Plaintiff's counsel forthwith pay to the Treasurer, Hamilton County, Ohio, the sum of $1,494.00, representing costs and attorney's fees incurred by the Office of the Prosecuting Attorney, Hamilton County, Ohio, as counsel for the County Defendants herein in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc. 38).

3. The request of plaintiff's counsel for a stay of this order pending appeal is DENIED.

Date: [9-25-96]

James F. Cook
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kathy Brown,	)	
	)	
Plaintiff,	)	
	)	Case No. C-1-95-815
vs.	)	
	)	
Correctional Medical Systems,	)	
Inc., et al.,	)	
	)	
Defendant.	)	

ORDER

This matter, which has already consumed an inordinate amount of the Court's time, is now before the Court upon a number of motions, appeals from orders of the Magistrate Judge, and requests for sanctions. The Court will dispose of each motion, appeal, and request in this Order to the extent that it is fully briefed.

1. Appeals from Orders of Magistrate Judge Cook

For several months, ending on September 30, 1996, visiting United States Magistrate Judge James Cook monitored this litigation and ruled on discovery related motions. That task assumed the qualities of a full time occupation as the parties filed documents at a frenzied pace. Predictably, Plaintiff has appealed several of the Magistrate Judge's rulings.

Each of the orders from which Plaintiff appeals addresses a nondispositive, discovery-related issue. This Court may only reverse an order of a magistrate judge in a discovery

matter upon a finding that the order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A); Fed. R. Civ. P. 72(a).

a. Sanctions against Teresa Cunningham

Pursuant to an Order dated July 19, 1996, Magistrate Judge Cook concluded that Plaintiff's counsel, Teresa Cunningham, had failed to comply with requests for discovery and that her conduct had necessitated intervention by the Court in the discovery process. The Magistrate Judge concluded that sanctions, pursuant to Rule 37(a)(4)(A) of the Federal Rules of Civil Procedure, were appropriate. Pursuant to an Order dated September 25, 1996, the Magistrate Judge set the amount of the sanctions based upon submissions by Defendants' counsel regarding their fees and expenses in preparing the motions to compel discovery. Plaintiff appeals from the July 19 and the September 25 Orders.

Ms. Cunningham's conduct clearly necessitated the motions to compel resulting in the Magistrate Judge's Order compelling responses to interrogatories and requests for production. Accordingly, sanctions were mandated, pursuant to Rule 37(a)(4)(A), which is, essentially, self-executing in the event that a motion to compel is granted. The Magistrate Judge did not err in concluding that sanctions were appropriate.

The Magistrate Judge awarded sanctions in the amount of attorney's fees and expenses related to the motions to compel. Rule 37(a)(4)(A) specifically provides for sanctions in that amount. Accordingly, the amount of the Magistrate Judge's award was not contrary to law.

Ms. Cunningham argues that the Magistrate Judge erred by permitting inflated fees and permitting both groups of Defendants to recoup fees for similar activities. The Court does not find the award to be clearly erroneous on those

grounds. Ms. Cunningham has not established that the Magistrate Judge's assessment that the requested fees were reasonable is clearly erroneous or contrary to law. Ms. Cunningham has also failed to establish that the two groups of Defendants, who have separate interests in this litigation and are represented by separate counsel, should not recoup attorney's fees and expenses to the extent that the work performed for each group was similar. Obviously, each group of Defendants was required to act in its own interests in light of Plaintiff's failure to respond to discovery requests. By failing to respond, Ms. Cunningham assumed the risk that both groups of Defendants would incur fees and expenses in petitioning the Court to compel discovery. The Magistrate Judge's Orders (Docs. 54 and 110) are hereby AFFIRMED.

b. Expert Witnesses

By Order dated September 5, 1996, Magistrate Judge Cook ruled that Harvey Rosen would not be permitted to testify as an expert witness in Plaintiff's behalf. The Magistrate Judge observed that the expert disclosure deadline had been extended and that Plaintiff had disclosed Mr. Rosen as a witness during the extended period. The Magistrate Judge further observed, however, that the deadline had been extended only for the purpose of permitting Plaintiff to identify a corrections expert to replace a previously disqualified corrections expert. Concluding that Plaintiff was well aware that the deadline had not been extended for other purposes, the Magistrate Judge excluded Mr. Rosen, who is an economist.

Plaintiff was not entitled to disclose experts after the deadline for doing so. Plaintiff had not disclosed an expert economist as of that deadline. The Magistrate Judge extended the deadline, but in his September 5 Order he set forth his finding that Plaintiff knew that the purpose of the extension was only to permit the identification of a corrections expert. Obviously, if the extension was thus restricted, Plaintiff cannot argue that other experts could properly be disclosed during the extended period. In any event, Plaintiff has not demonstrated that the September 5 Order was clearly erroneous or contrary to law, and the Order is hereby AFFIRMED.

Plaintiff also appeals from the Magistrate Judge's September 30, 1996 Order pursuant to which he denied Plaintiff's motion to extend the deadline for identifying expert witnesses. The decision whether to extend such a deadline, particularly when the discovery deadline in the case has passed, is within the discretion of the Magistrate Judge. Plaintiff has not demonstrated that the Magistrate Judge's failure to extend the deadline in this case was clearly erroneous or contrary to law. Accordingly, the Magistrate Judge's September 30 Order is hereby AFFIRMED.

c. The Spriggs Memorandum

Shortly before the suicide death of Casey Starcher, Plaintiff's counsel, Teresa Cunningham, and Defendant Joseph Spriggs, an employee of Defendant Correctional Medical Systems, Inc., spoke to one another by telephone concerning Mr. Starcher. Within days after Mr. Starcher's death, Defendant Spriggs drafted a memorandum to his supervisor, Jean Jones, concerning his conversation with Ms. Cunningham.

Plaintiff moved to compel production of the Spriggs memorandum. Magistrate Judge Cook denied the motion on

the ground that the document was prepared in anticipation of litigation and Plaintiff had failed to demonstrate that the requirements of Rule 26(b)(3) of the Federal Rules of Civil Procedure were satisfied with respect to the memorandum.

Plaintiff appeals on three grounds. First, Plaintiff contends that the Magistrate Judge erred in concluding that the memorandum was prepared in anticipation of litigation. Second, Plaintiff contends that substantial need has been demonstrated, contrary to the Magistrate Judge's finding. Third, Plaintiff contends that Plaintiff cannot obtain the substantial equivalent of the memorandum without undue hardship.

The Magistrate Judge concluded, based upon the affidavits in the record concerning the circumstances in which Defendant Spriggs drafted the memorandum, that the memorandum was prepared in anticipation of litigation. That conclusion is supported by evidence in the record, and the Court does not conclude that it was clearly erroneous or contrary to law.

Pursuant to Rule 26(b)(3), the Court may only compel the production of the memorandum upon a showing by Plaintiff of substantial need and an inability to obtain the substantial equivalent of the memorandum without undue hardship. The Magistrate Judge found that Plaintiff did not make such a showing. The Court concludes that that finding was neither clearly erroneous nor contrary to law.

Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs, during the telephone conversation in question, that Casey Starcher was suicidal and that recent developments in his state criminal case made a suicide watch particularly appropriate. Defendant Spriggs denied that Ms. Cunningham provided such information during their telephone conversation.

Plaintiff has had the opportunity to depose Defendant Spriggs concerning his recollection of the telephone conversation. The evidence in the record indicates that the memorandum also contains Defendant Spriggs recollection of the telephone conversation. Accordingly, Plaintiff has had the opportunity to obtain the substantial equivalent of the memorandum without undue hardship and has not demonstrated a substantial need for the memorandum. The Magistrate Judge's Order of September 5, 1996 is, therefore, AFFIRMED.

2. Motions Concerning Teresa Cunningham as Counsel

As the Court has observed, Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs in a telephone conversation shortly before Casey Starcher's suicide that Mr. Starcher was suicidal and that recent events made a suicide watch advisable. Defendant Spriggs has denied that Ms. Cunningham provided that information during the telephone conversation. Defendants have moved to disqualify Ms. Cunningham as counsel for Plaintiff in light of the likelihood that she will be called as a witness for Plaintiff. Ms. Cunningham has opposed the motions, has moved to strike one of the motions, and has refused to inform the Court whether she intends to testify, even when the Court has explicitly ordered her to do so. Ms. Cunningham has also moved for a protective order and to quash Defendant's subpoena duces tecum.

Plaintiff has not identified a viable alternative to Ms. Cunningham's testimony. Ms. Cunningham is the only witness to the telephone conversation in question other than Defendant Spriggs who denies Plaintiff's allegations concerning the content of the conversation. Without engaging in a thorough analysis of Plaintiff's claims, the Court believes that the allegations concerning the contents of the conversation are

essential to some or all of Plaintiff's claims. Accordingly, if Plaintiff intends to prove those claims, Ms. Cunningham will be required to testify to her recollection of the telephone conversation with Defendant Spriggs.

Disciplinary Rule 5-101 of the Code of Professional Responsibility, which is binding upon Ms. Cunningham as a member of the Ohio bar, provides, in pertinent part, as follows:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Disciplinary Rule 5-102 provides, in pertinent part, as follows:

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B)(1) through (4).

Ethical Consideration 5-9 elaborates upon the potential conflict created when an attorney acts as both witness and counsel:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Ethical Consideration 5-10 explains that "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

This Court recognizes that motions to disqualify counsel should be considered with extreme caution, in view of the litigant's interest in retaining counsel of the litigant's choice and the danger that an opposing party may use a motion to disqualify to obtain a tactical advantage. See Paretti v. Cavalier Label Co., Inc., 722 F. Supp. 985 (S.D. N.Y. 1989); see also Evans v. Artek Systems Corp., 715 F.2d 788, 791-92

(2d Cir. 1983). The Court also recognizes that care must be taken before disqualifying an attorney since interlocutory appeals are generally unavailable from such orders. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); In re Mechem, 880 F.2d 872 (6th Cir. 1989). Nevertheless, neither the United States Court of Appeals for the Sixth Circuit nor the Supreme Court of Ohio has hesitated to rule that an attorney whose testimony would cause a conflict under DR 5-101(B) or DR 5-102 must either voluntarily withdraw from the case or face disqualification. General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704 (6th Cir. 1982); Mentor Lagoons, Inc. v. Rubin, 31 Ohio St.3d 256, 260 (1987).

In this case, the Court concludes that Teresa Cunningham cannot continue as counsel for Plaintiff in light of her role as witness. The Court recognizes that Ms. Cunningham has not conceded that she will testify. As the Court has observed, however, Plaintiff has not identified a means of proving the alleged version of the telephone conversation other than by Ms. Cunningham's testimony. Accordingly, it is "obvious", for purposes of the Disciplinary Rules, that Ms. Cunningham ought to be called as a witness, and the Court ascribes no credibility to her equivocation concerning her intentions. Defendants' motions to disqualify Ms. Cunningham as counsel for Plaintiff (Docs. 63 and 88) are, therefore, GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify (Doc. 67) is DENIED.

Ms. Cunningham has submitted a motion for a protective order, to quash a subpoena issued by Defendants, and for sanctions (Doc. 106) related to attempts by counsel for Defendants to depose her. Ms. Cunningham's arguments in support of that motion are based upon her previous status as counsel for Plaintiff. Because she is no longer Plaintiff's counsel, the issues raised by her motions are predominately moot. Defendants may depose her, and she is obligated to respond to the extent that she may do so without disclosing

privileged information. Her motions related to Defendants' attempts at discovery (Doc. 106) are hereby DENIED.

3. Conclusion

The Orders of visiting United States Magistrate Judge James Cook dated July 19, September 5, September 25, and September 30, 1996 (Docs. 38, 85, 86, 99, and 105) are hereby AFFIRMED. Defendants' motions to disqualify Teresa Cunningham as counsel for Plaintiff (Docs. 63 and 88) are hereby GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify Ms. Cunningham (Doc. 67) is hereby DENIED. Ms. Cunningham's motions for protective order, to quash, and for sanctions (Doc. 106) are hereby DENIED. The motions of Hamilton County and Correctional Medical Systems for sanctions (Docs. 73 and 74) are hereby DENIED.

Defendants may take the deposition of Teresa Cunningham on or before October 31, 1996. Ms. Cunningham is DIRECTED to attend a deposition scheduled by Defendants, and Defendants are INSTRUCTED to consult with Ms. Cunningham in order to identify a mutually agreeable time and date for the deposition. Ms. Cunningham is ADVISED to respond to questions posed to her at such a deposition unless she is unable to do so in light of the attorney-client privilege. Counsel for Defendants may contact the Court in the event that difficulties arise in the scheduling or execution of Ms. Cunningham's deposition.

Dispositive motions may be filed on or before November 4, 1996. Opposing memoranda must be filed and served, via hand delivery or facsimile, on or before November 19, 1996. Reply memoranda must be filed and served, via hand delivery or facsimile, on or before November 29, 1996.

The Court will conduct the final pretrial conference in this matter as scheduled on December 13, 1996.

IT IS SO ORDERED.

_____

Sandra S. Beckwith
United States District Judge

No. 96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARWIN LEE STARCHER,	)
	)
Plaintiff,	)
	)
TERESA CUNNINGHAM,	)
	)
Attorney-Appellant,	)
	)
v.	)
	)
MEDICAL CORRECTIONS SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, Sheriff; SALLY REMILARD; Administrator of Correctional Medical Systems; JOSEPH SPRIGGS, Employee of Correctional Medical Systems,	)
	)
Defendants-Appellees.	)

Before: MERRITT, CONTIE, and BOGGS, Circuit Judges.

ORDER

The plaintiff's attorney appeals from an interlocutory order imposing sanctions under Rule 11, Fed. R. Civ. P. The defendants move to dismiss the appeal for lack of a final, appealable order. The appellant-attorney opposes the motion to dismiss and requests sanctions be imposed against the defendants for filing the motion to dismiss.

There is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable. *Compare Appeal of Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distributors, Inc. v. Maico-Fahzeugfabrik*, 658 F.2d 944 (3d Cir. 1981); *Click v. Abilene National Bank*, 822 F.2d 544 (5th Cir. 1987); *Howard v. Mail-Well Envelope Co.*, 90 F. 3d 433 (10th Cir.), *cert. denied*, 117 S.Ct. 484 (1996); *G.J.B. & Assoc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Sanders Associates, Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993); *with* Morley *v. Ciba-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810 (11th Cir. 1992). In light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised.

It therefore is ORDERED that the motion to dismiss is denied at this time. The appellants' request for sanctions is also denied. The parties are directed to address the court's jurisdiction in their appellate briefs.

ENTERED BY ORDER OF THE COURT

_____

Clerk

DARWIN LEE STARCHER and
KATHY BROWN, Plaintiffs,
TERESA CUNNINGHAM, Attorney-Appellant,
v.
CORRECTIONAL MEDICAL SYSTEMS, INC.;
HAMILTON COUNTY, OHIO; SIMON LEIS,
individually and in his capacity as Sheriff;
SALLY REMILARD; and JOSEPH SPRIGGS,
Defendants-Appellees.

No. 96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

May 21, 1998, Filed

COUNSEL: ARGUED: Teresa L. Cunningham, Cincinnati, Ohio, for Appellant.

ARGUED: Philip L. Zorn, Jr., HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

JUDGES: Before: BOGGS, MOORE, and FARRIS,* Circuit Judges. BOGGS, J., delivered the opinion of the court, in which FARRIS, J., joined. MOORE, J., delivered a separate dissenting opinion.

BOGGS, Circuit Judge.

Attorney Teresa Cunningham's appeal requires us to opine on an issue that has divided our sister circuits: whether an attorney who eventually withdraws or is disqualified from a case may take an immediate, interlocutory appeal from an

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

order in that case levying attorney's fees and costs against her for discovery violations. We believe the better view to be that an attorney in these circumstances may not take an immediate appeal, but rather must wait to file an appeal until final judgment is entered in the case. Because we lack jurisdiction to entertain this interlocutory appeal, we cannot disturb the order assessing attorney's fees and costs against Cunningham.

I

On September 19, 1995, Cunningham (a sole practitioner) filed suit under 42 U.S.C. § 1983 against defendants Correctional Medical Systems, Inc. ("CMS"), two CMS employees, Hamilton County, Ohio, and the Hamilton County sheriff. The complaint Cunningham filed on behalf of plaintiff Darwin Lee Starcher alleged that the defendants negligently failed to supervise Starcher's son Casey, despite his known history of suicide attempts, and thus violated Casey's constitutional rights. Casey committed suicide while incarcerated in the Hamilton County jail.

In March 1996, the magistrate judge assigned to the case entered a scheduling order. The scheduling order required that the plaintiff designate experts by June 7, 1996, and that the defendants designate experts by July 19, 1996. It also set a discovery cut-off date of September 16, 1996, and a deadline of October 16, 1996, for filing dispositive motions. Cunningham's representation was fraught was difficulties even from the earliest days of this litigation. To begin with, it was apparent early in the case that Cunningham might be a material witness in the case because she spoke to a CMS official about Casey Starcher's psychiatric condition just a few days before Casey's suicide. For that reason, on four separate occasions the defendants moved to disqualify Cunningham as counsel. The magistrate judge denied the first three of these motions.

While she was opposing these motions to disqualify, Cunningham also managed to get into serious discovery trouble. The defendants served Cunningham with interrogatories and document requests on May 29, 1996. Under Fed. R. Civ. P. 33 and 34, Cunningham had 30 days to respond to these discovery requests. On June 7, 1996, however, Cunningham informed defense counsel that she could not respond to the discovery requests because Darwin Lee Starcher, the administrator of Casey Starcher's estate, had died. Efforts to resolve the matter informally were rebuffed by Cunningham, as evidenced by an exchange of letters between Cunningham and defense counsel. Because the defendants were under a court order to disclose their experts and expert materials by July 19, 1996, the defendants moved on July 1, 1996, to compel production of the plaintiff's written discovery. Cunningham was served with this motion on July 1.

On July 10, 1996 -- at which point the plaintiff's discovery responses were already 10 days overdue -- the magistrate judge held a discovery conference to consider various pending discovery disputes, including the delinquency of the plaintiff's written discovery. At this conference, the magistrate judge ordered the plaintiff "by 4:00 p.m. on July 12, 1996 to make full and complete responses to the First Set of Interrogatories and Document Requests To Plaintiff." Further, the magistrate judge ordered the depositions of two witnesses for the plaintiff (Rex Smith and Roxanne Dieffenbach) and two defendants (Remilard and Spriggs) to take place on July 25, 1996, with the proviso that the depositions of the defendants would go forward only if the plaintiff had complied with written discovery obligations by July 12, 1996.

As things turned out, the plaintiff -- or, more to the point, Cunningham -- did not comply with either of these orders. With respect to the order to serve interrogatory responses by July 12, Cunningham responded merely with blanket objections, with incomplete responses, or, in some

cases, with no response at all. As for Cunningham's response to the defendants' document requests, defendants argue that Cunningham produced no documents at all, and the record does not reflect any written response to the document requests such as would be required under Fed. R. Civ. P. 34(b). With respect to the magistrate judge's order that depositions take place on July 25, to the defendants' great consternation Cunningham noticed the deposition of Rex Smith for July 22. The defendants immediately notified Cunningham that Smith could only be deposed on July 25, as ordered by the court.[1] Nonetheless, Cunningham refused to withdraw her deposition notice and the defendants resorted to filing a motion for protective order. Simultaneously, the defendants moved for an award of the attorney's fees they incurred in seeking court intervention to force Cunningham to comply with the earlier discovery order.

The magistrate judge scheduled a hearing for July 19, 1996. Cunningham attended this hearing, along with counsel for all defendants. At the hearing, Cunningham argued that she should be excused for failing to comply with her discovery obligations both because the defendants had served "contention" interrogatories,[2] the answers to which allegedly depended on documents to be produced by the defendants, and because her client had died and the new administrator of the Starcher estate was not returning her telephone calls. The only

[1] Cunningham testified that the reason she did not contact defense counsel to work out a compromise was that she "knew from prior experience from working with them that it wouldn't do any good; it would be a waste of time."

[2] "Contention" interrogatories are interrogatories that seek to clarify the basis for or scope of an adversary's legal claims. The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required. *See, e.g., Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1997).

reason Cunningham gave for noticing a deposition on a date different from the date previously ordered was that defense counsel would not consent to a change in the time and location of the deposition. Significantly (as explained below), Cunningham did not ask for additional time to prepare a defense to the motion for fees and costs, nor did she object to the timing of the hearing.

After hearing from all counsel, the magistrate judge ruled for the defendants on all issues. In particular, he issued a new order requiring Cunningham to supplement her discovery responses with full and complete responses within 10 days, he granted the defendants' motion for a protective order quashing the notice of depositions of the two defendants until Cunningham's discovery responses were received, and he granted defendants' motions for fees and costs, instructing defense counsel to file a bill of costs. The magistrate judge then received memoranda from the parties concerning the propriety of the fee award against Cunningham. In her memorandum, Cunningham argued (1) that the defendants' motions for fees and costs were received only shortly before the hearing before the magistrate judge, (2) that the magistrate judge's original July 10, 1996, order, requiring discovery responses by July 12th, gave her only two days within which to respond to discovery (despite the fact that she actually had the entire period from May 29th through July 12th to file responses), and (3) that the amount of requested attorney's fees was too high.

The magistrate judge rejected these arguments. He noted that the July 19th hearing had been scheduled on short notice "in view of the apparent urgency of these motions." He also stated that "all counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record." The magistrate judge then stated that:

> The authority for the [fees and costs imposed] by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants' motion for protective orders were granted after a hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants [sic] counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

With these findings in mind, the magistrate judge ordered Cunningham to pay $2928.00 in attorney's fees, copying costs, and postage to CMS, and $1690.50 in attorney's fees to the county defendants. The magistrate judge further noted that Cunningham "neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare." In closing, the magistrate judge stated that "the Court considers the conduct of plaintiff's counsel to be egregious." Over Cunningham's objections, the district court affirmed the magistrate judge's award of fees and costs. Simultaneously, the district court granted the defendant's motion to disqualify Cunningham as plaintiff's counsel. This appeal followed.

II

A

The final judgment rule, reflected in 28 U.S.C. § 1291, has deep roots in American law. *See Cobbledick v. United States*, 309 U.S. 323, 326 (1940) (noting origin of final judgment rule in Judiciary Act of 1789). Both to ensure the integrity of the trial process and to improve the efficiency of the judicial system, the final judgment rule essentially provides that interlocutory orders entered by a trial court -- such as discovery orders entered during pretrial proceedings, or evidentiary rulings made during trial -- may not be reviewed by an appellate court until the trial court enters a final judgment disposing of all claims at issue in the case.[3] More than 90 years ago, a unanimous Supreme Court held that an order compelling the production of discovery materials is a non-appealable interlocutory order. *See Alexander v. United States*, 201 U.S. 117 (1906). In *Alexander*, the Supreme Court recognized that "in a certain sense finality can be asserted" as to such orders, but only in the same sense that "finality can be asserted of any order of a court." *Id.* at 121. The Court therefore laid down a general rule governing the appealability of discovery orders: an individual subject to a discovery order can either obey the order, or can refuse to comply and face punishment for contempt. Because a contempt judgment is personal to the individual resisting the discovery order, and is considered final as to that individual, an immediate appeal is available. *See id.*

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[3] The principal exceptions to the final judgment rule are, first, Fed. R. Civ. P. 54(b), which permits a trial court to direct the entry of a "final judgment" in a case even though that judgment will not dispose of all claims (or will dispose of all claims, but not as to all parties) in the case; second, 28 U.S.C. § 1292(b), which permits an appeal from an interlocutory order if the trial court certifies that the order raises a controlling question of law as to which there is substantial ground for difference of opinion, and if the appellate court exercises its discretion to hear the appeal; and third, the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which permits the interlocutory review of certain collateral orders that conclusively determine a disputed question, that resolve an important issue, and that would be effectively unreviewable on appeal from a final judgment.

at 122. In *Alexander*, however, rather than openly resist a discovery order, the appellants simply appealed the order. The Supreme Court dismissed the appeal for want of jurisdiction because there was no final judgment as to the appellants. *See ibid.*

Alexander remains the general rule governing appeals from discovery orders.[4] However, the Supreme Court has carved out an exception for a "small class" of discovery and other interlocutory orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949). Our task today is to decide whether an order requiring the plaintiff's attorney to pay to defense counsel the costs incurred as a result of moving to compel discovery qualifies as a member of the "small class" of immediately appealable collateral orders contemplated in *Cohen*.

In addressing this question, two prefatory comments are required. First, while we are sympathetic to the plight of Ms. Cunningham, who may, as a practical matter at this late date, have no avenue for appellate review other than this proceeding,[5] the mere fact that she may be unable to obtain appellate review does not enter into our jurisdictional analysis. As the unanimous Supreme Court has said, "the right to a judgment from more than one court is a matter of grace and not

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[4] The Supreme Court's adherence to the *Alexander* procedure for obtaining appellate review of discovery orders has been unswerving. *See Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992); *United States v. Ryan*, 402 U.S. 530 (1971).

[5] The underlying case has been dismissed by the district court since this appeal was filed, and Cunningham did not file a notice of appeal from the order dismissing the case.

a necessary ingredient of justice. Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick*, 309 U.S. at 325. Second, our subjective assessment of the importance, if any, of the underlying issues raised by Cunningham's appeal also cannot enter into our analysis. The Supreme Court has declined to extend the collateral-order doctrine to cover appeals from judgments of even the most sweeping import. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (holding class-certification order not appealable under *Cohen*); *cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (recognizing broad significance of class-certification orders and noting that writ of mandamus was required to obtain appellate review of such an order).

B

The precise question presented today is whether Cunningham, an attorney representing the plaintiff who was disqualified as counsel during the course of the litigation below, has a right to an immediate appeal from an order imposing attorney's fees and costs on her because her opponents were forced to move for an order compelling her to comply with a previous discovery order. To qualify as an immediately appealable collateral order under *Cohen*, this order would have to conclusively determine the disputed question (here, Cunningham's liability for attorney's fees and costs), resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal. It is beyond dispute that the first *Cohen* factor is satisfied here; accordingly, we focus our attention on factors two and three.

The circuits have divided over the question of whether a discovery order directed at an attorney participating in the underlying lawsuit raises issues "completely separate from the

merits of the action."[6] Five circuits have held that orders similar to the order at issue in this case (including orders imposing sanctions under Fed. R. Civ. P. 11, orders assessing attorney's fees under Fed. R. Civ. P. 37, and others) are so completely separate from the merits of the underlying action as to be immediately appealable by the attorney subject to the order. *See Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 (11th Cir. 1992); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Med. Svcs, Inc.*, 855 F.2d 1470, 1472-73 (9th Cir. 1988); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985); *Cheng v. GAF Corp.*, 713 F.2d 886, 889 (2d Cir. 1983). Five other circuits have come to the opposite conclusion. *See Sanders Assocs., Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564, 569-70 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981).

Because our circuit has not yet stepped into these cross-currents, we are especially mindful of *Cohen*'s dictum that practical considerations are paramount in deciding whether a particular kind of order qualifies for immediate appeal under the collateral order doctrine. *See Cohen*, 337 U.S. at 546. In this regard, it is telling that even some of those circuits that initially embraced the idea that an attorney could immediately appeal an order imposing discovery sanctions have since recognized its significant potential for disruption of the trial process. The Second Circuit, for example, recently noted that

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[6] We recognize, of course, that Cunningham was no longer participating in the case at the time she filed this appeal; she had been disqualified as counsel on the same day the district court affirmed the magistrate judge's order imposing attorney's fees and costs against her. We discuss the question of whether this distinction matters in Section II.C, *infra*.

its precedent permitting attorneys immediately to appeal sanctions orders led to a "flurry of arguments, charges and countercharges, motions and cross-motions and other papers in the district court" that "effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying . . . litigation." *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997). In light of the practical effects of its precedent, the court went so far as to say that "were we writing on a clean slate, we would be tempted to confine *Cheng* to its unusual facts and characterize the sanctions order here as nonappealable under the *Cohen* doctrine." *Ibid.* Similarly, the Seventh Circuit recently acknowledged that its precedents permitting immediate appeals by sanctioned attorneys "have not played to universal acclaim," and noted that extension of these precedents "would produce a substantial, and unjustified, erosion of the final-decision requirement." *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997).

In short, several circuits have experimented with the "immediate appeal" rule urged by Cunningham, and the experience has not been positive. We therefore are not persuaded that the issues presented by an appeal such as Cunningham's reliably could be deemed completely separate from the merits of the underlying case. It is conceivable, of course, that in an extreme case where an attorney provides absolutely no response to discovery, the issue of the attorney's compliance with a discovery order would not implicate any merits issues. But here, Cunningham provided responses to at least some of the defendants' discovery requests, and presumably her challenge to the district court's Rule 37 order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits. We therefore conclude that the issues involved in Cunningham's appeal likely would not turn out to

be "completely separate" from the merits of the underlying case.

C

Our dissenting colleague argues that the crucial fact entitling Cunningham to an immediate appeal is that she was disqualified as counsel in the underlying case and that, therefore, her appeal is lexically "separate" from the issues involved in the underlying case. *See infra* at 18-20. On this issue too, the circuits are split. Of the five circuits (First, Third, Fifth, Tenth, and Federal) that refuse to permit a participating attorney to file an immediate appeal under the collateral order doctrine, two have held nevertheless that an attorney who has withdrawn from representation in the underlying case is entitled to an immediate appeal. *See Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985). By contrast, one of these circuits has specifically reached the opposite conclusion. *See Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir.), *cert. denied*, 117 S. Ct. 84 (1996).[7]

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[7] In addition, the D.C. Circuit recently held that a non-participating law firm was not entitled to an immediate appeal of a discovery order. *See In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). While the law firm in that case was never involved in a representative capacity in the underlying case (it was instead the target of a civil subpoena), the fact that the firm was not deemed entitled to an immediate appeal provides strong further support for the proposition that the attorney's involvement or lack of involvement in the underlying case cannot be dispositive in determining whether the attorney is entitled to an immediate appeal. Surely if an attorney who was never involved in a case is not sufficiently "separate" from the case to warrant immediate appellate review, an attorney (like Cunningham) who was involved but subsequently is disqualified cannot be entitled to an immediate appeal.

We believe the better view is that a non-participating attorney, like a participating attorney, ordinarily must wait until final disposition of the underlying case before filing an appeal. For one thing, it would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985) (order disqualifying counsel in civil case not immediately appealable under collateral order doctrine). Moreover, from a practical perspective, there are serious administrative problems with a rule that hinges on whether the attorney subject to the discovery order is a participating or non-participating attorney. Here, by sheer fortuity, it happens that the order affirming the magistrate judge's order that Cunningham pay attorney's fees was issued on the same day as the order disqualifying Cunningham from the case. We can easily conceive of cases where this does not happen -- where, for example, an attorney is ordered pursuant to Rule 37 to pay attorney's fees associated with a discovery dispute, and then does not withdraw or become disqualified as counsel for months or years afterward. In such a case, when would the 30-day filing period of Fed. R. App. P. 4 begin to run -- from the date of the Rule 37 order, or from the date of withdrawal? Either outcome strikes us as fraught with difficulty.

Expanding the collateral order doctrine to cover cases like Cunningham's seems particularly unwise at a time when requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses. Creating a distinction between participating and non-participating attorneys could add another tactical arrow to the arsenal; litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case. For all these reasons, we decline to adopt a distinction between participating

and non-participating attorneys for purposes of the collateral order doctrine.

D

Because Cunningham's appeal does not satisfy the second element of the *Cohen* test, we need not address the third element -- whether the order would be effectively unreviewable absent an interlocutory appeal -- in any great detail. As on the other dimensions of this case, the circuits are divided fairly evenly between those that believe a sanctioned attorney satisfies the third *Cohen* factor and those that do not. This circuit split is somewhat puzzling in light of the Supreme Court's recognition that orders awarding attorney fees are appealable independent of the disposition of the merits of the underlying case. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200 (1988). We see no reason why, after final resolution of the underlying case (whether the resolution be a judgment for plaintiff, a judgment for defendant, or an out-of-court settlement), a sanctioned attorney should be unable to appeal the order imposing sanctions. Of course, if the person involved is a non-participating attorney, this may require her to monitor the progress of the litigation with some care. This fact does not change our analysis of the third *Cohen* factor, however; it is important not to "improperly blur the line between the impossibility of effective review necessary under the *Cohen* doctrine and [the] mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal." *Howard*, 90 F.3d at 437.

III

For the foregoing reasons, we conclude that we have no jurisdiction over Cunningham's appeal. Therefore, the appeal is DISMISSED.

KAREN NELSON MOORE, Circuit Judge, dissenting.

I write separately to highlight the unnecessarily broad brush the majority uses to paint on this otherwise narrow canvas. Specifically, I harbor grave concerns regarding three facets of the majority opinion. First, the majority holds that sanctions orders, such as the one appealed from in this case, fail to satisfy the second *Cohen* element requiring that the merits of the underlying litigation be separate from the sanctions order.[1] *See* Slip Op. at 9-12. Second, the majority rejects any distinction between those attorneys who are and those who are not participating in the underlying litigation, despite the weight of authority accepting this distinction. Finally, the majority ignores the inequity of applying its new rule, retroactively, to bar a merits review of the issues raised by Cunningham in this appeal. *See* Slip Op. at 8, n.5.

In my view, Cunningham's appeal satisfies the second *Cohen* requirement in that the sanctions order is separate from the merits of the underlying action. Although in some instances sanctions orders may be intertwined with the merits, none of these circumstances are present in this case. For example, in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990), the plaintiff's lawyer failed to turn over notes requested by the defendant's lawyer and then used those notes at trial. The district court sanctioned the plaintiff's lawyer for failing to produce the notes to defendant's counsel. On appeal, the Tenth Circuit held that the sanctions arose from a discovery dispute over the relevance of the notes. Accordingly, any evaluation of relevancy would necessarily require the court to examine the merits of the underlying action. The court thus concluded that the attorney's appeal failed to satisfy the *Cohen* requirements and should await a final judgment in the case. *Accord Eastern*

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[1] In dictum, the majority notes that maybe in an "extreme case" the sanctions order "would not implicate any merits issues." Slip Op. at 12.

Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H., 658 F.2d 944, 947 (3d Cir. 1981) (dismissing appeal for failure to satisfy *Cohen* requirements where review of sanctioning of attorney for filing dilatory discovery motions required examination of relevance to underlying dispute). *Cf. Evanson v. Union Oil Co. of California*, 619 F.2d 72 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980) (sanctioned party requested appellate court to vacate district court's sanction order for lying in interrogatory answers, and court of appeals refused where determining truth or falsity of answers would require it to evaluate the merits of the underlying action).

Contrast the holdings in the preceding cases with the holding in *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989). In that case, the magistrate judge imposed monetary sanctions on an attorney under Rule 37 for failure to provide complete answers to interrogatories and for failure to produce requested documents, and the district court affirmed the sanctions order. On appeal, the Second Circuit concluded that the appeal satisfied the second *Cohen* requirement "since the imposition of the sanction involves an issue completely separate from the merits of the underlying litigation." *Id.* at 685 (quotation omitted).

The facts presented in Cunningham's appeal more closely resemble the facts in *Thomas E. Hoar, Inc.* than those facts presented in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson*. Specifically, unlike the appellants in those cases, Cunningham does not contend that her failure to answer the discovery turned on the relevance or scope of the discovery, or that her answers were true where the district court found them to be false. Those kinds of contentions could have required this court to evaluate the merits of the underlying action to determine if the interrogatories were relevant, covered an appropriate time frame, or whether Cunningham's responses were in fact true. As the courts in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson* correctly concluded, any such

evaluation of the merits would by its very nature run afoul of *Cohen*'s requirement that the sanctions order and the merits be "completely separate."

Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments against the sanctions order involve the substance of the discovery itself. Consequently, like the appellant's due process objection in *Thomas E. Hoar, Inc.*, resolution of Cunningham's timing and due process objections to the sanctions order would not compel us to address the merits of the underlying action. Therefore, Cunningham's appeal satisfies the second *Cohen* requirement. In my view, the majority opinion needlessly forecloses the possibility that some sanctions orders, not just those in an "extreme case," will not be intertwined with the merits and thus will satisfy the second *Cohen* requirement.

Next, the majority rejects the participating and non-participating attorney distinction. However, of the five circuits to consider this issue explicitly, four have found this distinction persuasive. *Compare Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997) ("As a general rule an attorney must await the end of litigation in the district court to appeal a sanction . . . . However, we recognize[] an exception to this rule in those situations in which the sanctioned attorney is no longer involved in the case and an appeal of the sanctions order would not impede the underlying litigation."); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985) (holding that a sanctioned attorney who has withdrawn from the representation may take an interlocutory appeal under *Cohen*); *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 731 (9th Cir. 1995) (sanctioned counsel who has withdrawn from the representation may take

an interlocutory appeal under *Cohen*); *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984) (same), *with Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir. 1996) (rejecting interlocutory appeal of sanctions order by withdrawn attorney).

With respect to *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), cited by the majority in a footnote, that case did not address the issue of whether a sanctioned attorney who has withdrawn or been disqualified from representing a party to the underlying action may immediately appeal the sanctions order. Instead, that case addressed the issue of whether a law firm subjected to a subpoena duces tecum relating to a case in another district court in which it was not a party could immediately appeal an order of a federal district court transferring the case to that other federal district court. The D.C. Circuit held the law firm could not immediately appeal such an order, but must either disobey the order, be cited for contempt, and then appeal the contempt order, or must file a petition for a writ of mandamus. *See id.* at *1. In that case, the law firm proceeded by way of a mandamus petition. Accordingly, the *Sealed* case, which focuses on a peripheral issue, provides little support for the Tenth Circuit's position in *Howard* denying an immediate appeal of the sanctions order to a sanctioned attorney who no longer represents a party in the underlying action, a position that is contrary to the weight of published authority.

The Tenth Circuit bases its restrictive position on the ground that a sanctioned attorney no longer connected to the underlying action may appeal at the conclusion of that action, whether the court issues a final judgment, or the parties settle the case. Thus, the Tenth Circuit holds the sanctioned attorney fails to meet the third *Cohen* requirement of demonstrating that the sanctions order will be effectively unreviewable on appeal from a final judgment. *See Howard*, 90 F.3d at 436-37. This is a debatable issue, as manifested by the even split among our

sister circuits when the sanctioned attorney remains as an attorney in the underlying litigation. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits hold that a sanctioned attorney meets this third requirement. *See, e.g., Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95-96 (2d Cir.), *cert. denied*, 118 S. Ct. 337 (1997); *Serritella v. Markum*, 119 F.3d 506, 512 (7th Cir.), *cert. denied sub nom. Steagall v. United States Dist. Court of Cent. Dist. of Ill.*, 118 S. Ct. 566 (1997); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 (11th Cir. 1992). Conversely, the First, Third, Fifth, Tenth, and Federal Circuits hold that a sanctioned attorney who remains as counsel in the litigation fails the third *Cohen* requirement. *See, e.g., In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394, 398 (Fed. Cir. 1993).

Today, the majority rejects the weight of authority, holding that a nonparticipating attorney, such as Cunningham, cannot take an interlocutory appeal of a sanctions order. Adopting the reasoning in *Howard*, the majority holds that in this circuit, a sanctioned attorney, whether participating or nonparticipating in the underlying action, must wait until the termination of that litigation to take an appeal of the sanctions order. In holding that adequate and effective appellate review is available at the conclusion of the case, the majority renders it impossible for nonparticipating sanctioned attorneys to satisfy the third *Cohen* requirement. Although I remain unpersuaded by the majority's view that nonparticipating attorneys must await the conclusion of the underlying action in order to appeal the sanctions order, I am bound by this new holding that review

is both available and effective when delayed until the conclusion of a case in which the attorney no longer has a role.

Having announced a new rule in this circuit, the majority suggests that its holding applies retroactively so as to bar a merits review of the issues Cunningham raises in this appeal. *See* Slip Op. at 9 & n.5. Because Cunningham did not file a notice of appeal upon the termination of the underlying litigation, retroactive application of the majority decision effectively bars any review of the district court's sanctions imposed upon her. The inequity of this result is patently obvious. When faced with a similar situation, the Tenth Circuit in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990), refused to impose such an unfair result on the attorney, explaining that

> the sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible, to foretell. Consequently, to apply our holding retroactively would be inequitable. . . . If we dismiss [the attorney's] appeal for want of jurisdiction, he will be remediless for the time has passed to file a new notice of appeal from the final judgment. While the aim of our holding--to effectuate the purposes of the final judgment rule--would not be hampered by its retroactive application, the small benefit we would gain by applying our holding retroactively does not outweigh the inequity which would result from such a determination. Accordingly, we conclude that our holding should not apply retroactively . . . .

Id. at 829-30. As in *G.J.B.*, principles of equity militate here against retroactive application of the majority's new rule and

compel this court to conduct a merits review of the issues Cunningham raises in this appeal.

For the foregoing reasons, I respectfully dissent.

DARWIN LEE STARCHER AND
KATHY BROWN, Plaintiffs,
TERESA CUNNINGHAM, Attorney-Appellant,
v.
CORRECTIONAL MEDICAL SYSTEMS, INC.
ET AL., Defendants-Appellees.

96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

August 5, 1998

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and discussion of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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QUESTION PRESENTED

When may an attorney appeal a sanctions order: (i) not until final judgment (the rule in the Sixth and Tenth Circuits); (ii) immediately, *so long as* she is no longer participating in the case (the rule in the Fifth Circuit); (iii) immediately, *so long as* she is no longer participating *and* the appeal is not intertwined with the merits of the case (the rule in the Third Circuit); (iv) immediately, *so long as* the sanction is "significant" (the rule in the Eleventh Circuit); or (v) immediately, without conditions (the rule in the Second, Seventh, Eighth, and Ninth Circuits, but rejected by the First, Fourth, and Federal Circuits)?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Defendants-Appellees Correctional Medical Systems, Inc., Simon Leis, Sally Remilard, and Joseph Spriggs were parties to the proceedings below.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The magistrate judge's opinions granting Respondent's motion for sanctions (App. 10-12) and setting the amount of sanctions (*id.* at 13-21) are unreported. The district court's opinion affirming (*id.* at 22-32) is unreported. The Sixth Circuit's opinion dismissing Petitioner's appeal for lack of jurisdiction (*id.* at 35-55) is reported at 144 F.3d 418. The Sixth Circuit's order denying rehearing and rehearing *en banc* (*id.* at 56) is unreported.

JURISDICTION

The Sixth Circuit entered its judgment on May 21, 1998. The Sixth Circuit denied rehearing and rehearing *en banc* on August 5, 1998. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTORY PROVISION INVOLVED

28 USC 1291 provides in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT

I. The District Court Sanctioned Petitioner On The Ground That She Committed Discovery Abuses.

A. The Allegations of the Complaint

In the litigation underlying this case, Petitioner, a solo practitioner in Florence, Kentucky, brought a wrongful death action on behalf of Mr. Darwin Starcher. Case No. 1-95-815 (S.D. Ohio). The Complaint sought damages as a result of the

suicide death of plaintiff's son, Casey Starcher (hereinafter "Casey"), while incarcerated in the Hamilton County, Ohio Justice Center. The Complaint named several defendants, including Hamilton County, Ohio, Respondent here. *See* Court of Appeals Joint Appendix ("Ct. App. J.A.") at 022, ¶ 5.[1] The Complaint alleged that the defendants' wrongful failure to place Casey on suicide watch, despite his known depression and history of suicide attempts, made it possible for Casey to kill himself.

The Complaint sets forth a number of allegations regarding Casey's suicide and the defendants' knowledge of Casey's history of suicide attempts while incarcerated. *E.g.*, Ct. App. J.A. at 024-25, ¶¶ 10-14. In particular, on August 3, 1995, Casey was advised that a trial court had denied his motion to withdraw a guilty plea on the charges pending against him. *Id.* at 026, ¶ 19. That same day, an employee of the Justice Center was advised to watch Casey closely in light of his history of suicide attempts and the trial court's unfavorable ruling. *Id.*, ¶ 20. But no employee of the Justice Center checked on Casey from 11:00 p.m. that evening, when he was locked in his cell for the night, until 6:00 a.m. the next morning. *Id.* at 026-27, ¶ 21. At that time, Casey was found dead, with a plastic bag and blanket over his head. *Id.* The Complaint sought damages for Casey's death under 42 USC 1983, as well as under an Ohio statute, O.R.C. 341.01. Ct. App. J.A. 029-30, ¶¶ 35-38.

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[1] Jurisdiction was based on 28 USC 1331, 1343. An Amended Complaint was filed in October 1996. Ct. App. J.A. at 495-507. The allegations of the original and amended complaints are functionally identical for present purposes. But because the sanctions arose while the original complaint was the operative pleading, we cite to it.

B. The Discovery Disputes Giving Rise To Sanctions Against Petitioner

The district court referred the matter to a magistrate judge. App. 1 (docket nos. 3-5). The case then devolved into substantial wrangling over discovery and procedural issues. Two separate sets of defendants moved to disqualify Petitioner on the ground that she was a potential witness in the case. App. 1 (docket nos. 18, 20, 26). In addition, Petitioner's client, the plaintiff, died. After Casey's sister was appointed as a new administrator for his estate, communications with Petitioner were gravely difficult because the administrator lived several hours away and did not have a telephone. Ct. App. J.A. at 234; Pet. C.A. Br. 5, 6.

In the midst of this, discovery commenced, resulting in the two discovery disputes relevant here. Nine days after the defendants served discovery requests, and some three weeks before responses were due, Petitioner advised the defendants that she could not yet prepare full and complete responses because of her inability to communicate with the administrator. App. 37. The defendants, however, displayed little patience, filing a motion to compel on the *first* business day after Petitioner was to file discovery responses. App. 1 (docket no. 10). The magistrate promptly held a hearing on that and eleven other motions already pending. Despite the death of Petitioner's client, the magistrate ordered that Petitioner produce "full and complete" responses to the defendants' interrogatories within two days. Ct. App. J.A. at 095. The magistrate also set a date for the deposition of an individual named Rex Smith. *Id.* at 096.

Soon after the hearing before the magistrate, Petitioner learned that Rex Smith lived in Indianapolis, Indiana and would be available for deposition in that city, but only on a date three days prior to that specified by the magistrate. Ct. App. J.A. 101, 136. Petitioner therefore served a deposition notice for Indianapolis for the date the witness was available. *Id.* at 108-10. Defendants objected that same day, and

Petitioner responded immediately, offering to conduct the deposition on the date specified by the magistrate and otherwise seeking to reach an accommodation. *Id.* at 136 ("If this cannot be worked out, I suggest we contact the Court for a discovery conference."); *id.* at 211-12 ("I said, Mr. Zorn [Respondent's counsel], he's in Indianapolis; he will not come to Cincinnati. Would you like to dispose [sic] Mr. Smith on the 25th in Indianapolis? He said, no, it has to be in your office [in Cincinnati].").

C. The Magistrate's Sanctions Order

When the defendants insisted categorically that the deposition notice be withdrawn, the parties filed competing motions with the magistrate. Petitioner, on behalf of the plaintiff, moved to compel compliance. App. 10. The defendants responded with four separate, but essentially duplicative, motions to quash and for sanctions. App. 2-3 (docket nos. 30, 31, 32, 34). The day after Petitioner issued the deposition notice, Respondent moved for a protective order prohibiting the deposition from going forward and for "appropriate sanctions." Ct. App. J.A. at 098-112. The next day, another group of defendants filed a parallel motion for a protective order and sanctions based on the deposition notice. *Id.* at 113-41. The same day, the defendants jointly filed yet a third motion arising from the deposition notice, this one moving to quash the notice entirely. *Id.* at 174-89. Respondent specifically maintained that the subpoena contravened both the magistrate's order setting the deposition date and also a "verbal but unrecorded understanding of the Court and all counsel that [the deposition] would be taken at the office of plaintiff's counsel here in Cincinnati." *Id.* at 098. The defendants in addition maintained that the interrogatory responses prepared by Petitioner after the previous order of the magistrate remained inadequate. *Id.* at 142.

Two days later, the magistrate held a hearing on the motions. Petitioner, however, did not receive the defendants' motions until approximately two hours before the hearing. Ct. App. J.A. at 270, 272. Even then, she could not review the papers but instead had to appear before another judge. *Id.* At the hearing, the magistrate granted the defendants' motions to quash and for a protective order and denied the plaintiff's motion to compel. Because the magistrate found that Petitioner had violated its earlier order, it also granted the defendants' motions for sanctions. App. 11.

The magistrate directed the defendants to submit specific requests for sanctions "indicating their reasonable fees and expenses for their court appearance on these motions and their preparation for today's hearing." App. 11. Petitioner subsequently objected to the sanctions award, as the magistrate recounted:

> Plaintiff's responses (Doc. 52 and 53) set forth objections to the Court's order of sanctions and award of attorney's fees and to the amounts claimed by defendants' counsel, respectively. It is argued that plaintiff's counsel was denied due process because she didn't have adequate time to prepare a defense; that the time claimed by Attorney Hurley [Correctional Medical System's counsel] is exaggerated; that the defendants' motions are duplicative; that the hourly rate claimed by Attorney Hurley is excessive; that the time claimed by Attorney Zorn [Respondent's counsel] is exaggerated and that the hourly rate claimed by Attorney Zorn is excessive.

Id. 18. The magistrate agreed to deduct 1.31 hours from the time claimed by Respondent's counsel but otherwise rejected Petitioner's objections to the sanction. The magistrate therefore directed that Petitioner pay Respondent $1494.[2]

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[2] The $1690.50 figure cited by the Sixth Circuit (App. 40) is not correct. The court also ordered Petitioner to pay other

Finding "the conduct of plaintiff's counsel to be egregious," the magistrate ordered that the sanctions be paid "forthwith" and refused to enter a stay pending appeal. *Id.* at 20-21.

D. The District Court's Order Affirming The Sanctions

Petitioner filed objections to the sanctions with the district court. Ct. App. J.A. at 277-413. Petitioner contended that she had made all reasonable efforts to comply with the magistrate's scheduling order and that the magistrate had failed to provide her an opportunity to prepare a defense. *Id.* at 285-86. Petitioner furthermore argued that the "hourly rates of defense counsel are inflated" and encompassed "duplicated work." *Id.* at 472. In the event that the district court disagreed, Petitioner sought a stay of the enforcement of the award pending appeal, explaining that Respondent already was attempting to collect the award. *Id.* at 471. The district court disagreed with Petitioner and affirmed the sanctions on October 22, 1996. App. 31. In the same order, the district court disqualified Petitioner as counsel to the plaintiff on the ground that she would be a witness in the case, and she subsequently was deposed. *Id.* at 30; App. 5-6 (docket no. 127) The court did not stay the sanctions.

On November 1, Petitioner filed a notice of appeal "from the decision issued by Judge Beckwith on October 22, 1996 affirming magistrate James Cook's imposition of sanctions." C.A. App. at 043; *see also* FRAP 3. In the district court, Petitioner then filed a "Motion To Stay Collection Of Sanctions Pending Appeal." App. 6 (docket no. 133); FRAP 8(a). In this motion, Petitioner explained:

> Teresa Cunningham moves this Court for an order staying collection of sanctions imposed in this matter on October 22, 1996. Ms. Cunningham, feeling aggrieved by the order, has appealed to the Sixth Circuit Court of Appeals from the Order. . . . If the appeal is granted, it would be difficult for Ms. Cunningham to recover the monies paid to the defendants.

Petr's Motion To Stay Collection of Sanctions Pending Appeal at 1-2. The district court subsequently granted the stay and Respondent accordingly has not collected the sanction. App. 6 (docket no. 138).

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defendants attorney's fees as sanctions, which later were settled. *Id.* at 8 (docket nos. 200, 216, 217).

While the sanctions were on appeal, the proceedings continued in the district court without delay. Discovery continued on both sides and a variety of motions were filed. Just under a year after Petitioner appealed, the district court entered summary judgment in favor of the defendants on the federal claims, and dismissed the remaining state law claims without prejudice. App. 7 (docket no. 187). The plaintiff appealed to the Sixth Circuit. *Id.* at 8 (docket no. 190). Petitioner, whose appeal of the sanctions order still was pending before the Sixth Circuit, did not file a separate notice of appeal from the final judgment.

II. The Sixth Circuit Dismissed Petitioner's Appeal For Lack Of Jurisdiction.

A. The Majority Opinion

Petitioner's appeal to the Sixth Circuit raised the same contentions as her objections filed with the magistrate and district court. A divided panel of the Sixth Circuit, however, dismissed Petitioner's appeal for lack of jurisdiction, acknowledging that it was "sympathetic to [her] plight." App. 42-43. The majority recognized that a substantial majority of circuits would find appellate jurisdiction on these facts (Pet. for Cert. at 12-16). It furthermore recognized that this Court in *Alexander v. United States*, 201 US 117 (1906), held that a third party may disobey a discovery subpoena and appeal

immediately if punished by the court. The majority below recognized that "*Alexander* remains the general rule governing appeals from discovery orders" and furthermore that "[t]he Supreme Court's adherence to the *Alexander* procedure for obtaining appellate review of discovery orders has been unswerving," but it nonetheless refused to follow *Alexander* on the ground that the rule of that case applies only when a district court enters a finding of civil contempt. *Id.* 41-42.

The majority concluded that this case is controlled by the three-part test of appealability derived from *Cohen v. Beneficial Industrial Loan Co.*, 337 US 541 (1949). Under the "*Cohen* doctrine," an immediate appeal is permitted notwithstanding the absence of a final judgment, from orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

The majority concluded that attorney sanctions orders do not satisfy the second *Cohen* criterion because "the issues presented by an appeal such as [Petitioner's]" could not "be deemed completely separate from the merits of the underlying case." App. 45. The majority reasoned that,

> Cunningham provided responses to at least some of the defendants' discovery requests, and presumably her challenge to the district court's Rule 37 [sanctions] order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits.

Id. at 45.

The majority furthermore refused to attribute any significance to the fact that, at the time Petitioner appealed, she was not serving as counsel in the case. The Sixth Circuit believed it "would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself" under *Richardson-Merrell, Inc. v. Koller*, 472 US 424 (1985). App. 47. The majority also foresaw "serious administrative problems" with determining whether the time to appeal should run from the sanctions order or instead the date of the attorney's withdrawal from the case. *Id.* 47.

The majority contemplated that a sanctioned attorney would appeal at the end of the case, but acknowledged that such an appeal was a practical impossibility here. App. 42. The district court entered its final judgment while Petitioner's appeal from the sanctions order still was pending before the Sixth Circuit. Petitioner therefore did not appeal from the final judgment. Under the court of appeals' holding, Petitioner thereby forfeited entirely her ability to contest the sanctions against her. *See* App. 4-7 (docket entries 99 (magistrate judge order of 9/25/96 imposing sanctions); 127 (district court order of 10/22/96 affirming sanctions); 133 (Petitioner's notice of appeal dated 11/1/96); 187 (final judgment dated 10/9/97)).

B. The Dissent

Judge Moore dissented, explaining that the sanctions order and Petitioner's appeal were not "intertwined with the merits" of the underlying case. Contrasting the majority's view that "presumably" Petitioner's appeal would turn on the nature of the evidence in the case, Judge Moore detailed the *actual* claims raised by Petitioner:

> Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer

> the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments against the sanctions order involve the substance of the discovery itself.

Id. at 51. Resolving these contentions, the dissent explained, "would not compel us to address the merits of the underlying action." *Id.* at 51.

Judge Moore also would have held that an immediate appeal may be brought by an attorney no longer participating in the case, noting that a number of circuits "have found this distinction persuasive." App. 51. At the very least, according to Judge Moore, the majority's decision would result in a "patently obvious" "inequity" by depriving Petitioner of any opportunity to appeal. *Id.* 54.

SUMMARY OF THE ARGUMENT

The sanction imposed upon Petitioner is immediately appealable under the "*Cohen* doctrine." First, the order finally determined the sanction, a point the majority below did not dispute. Indeed, Petitioner was subject to Respondent's right to require payment of the sanction. Second, an attorney sanction is "collateral to the merits," as this Court squarely held in two decisions the Sixth Circuit ignored. *Willy v. Coastal Corp.*, 503 US 131, 137 (1992); *Cooter & Gell v. Hartmarx*, 496 US 384, 395-96 (1990). Third, the sanction was effectively unreviewable on appeal from the final judgment because Petitioner was not a party to the suit and therefore was *prohibited* from appealing the final judgment. *Marino v. Ortiz*, 484 US 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment is well settled.").

A holding that Petitioner properly appealed from the sanctions order will not interfere with district courts' orderly

administration of their proceedings. Here, the district court entered the sanction conclusively, rendering it immediately executable. Because Petitioner could not appeal the final judgment, she had to appeal directly from the sanction or not at all. If the district court instead had chosen to merge the sanction into the final judgment or to finalize the sanction at the end of the case, Petitioner could have and would have waited to appeal. District judges thus have it within their discretion to impose – and parties have it within their discretion to request – immediately executable sanctions that may be appealed upon entry or instead sanctions that will not be final and appealable until the end of the case. Under the holding of the Sixth Circuit, by contrast, attorneys *always* must await the end of the case before appealing, even if the attorney must pay a substantial financial sanction immediately and the case may not conclude for years.

ARGUMENT

Congress provided in 28 USC 1291 that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."[3] The term "final decision" has two components. "The requirement of finality precludes consideration [1] of decisions that are subject to revision, and [2] even of "fully consummated decisions [that] are but steps towards final judgment in which they will merge.'" *Behrens v. Pelletier*, 516 US 299, 305 (1996) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 US 541, 546 (1949)) (third alteration in original). Appeal thus generally must await the "decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe v.*

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[3] The statute does not apply if the final decision otherwise may be appealed directly to this Court. 28 USC 1291.

Biard, 486 US 517, 521 (1988) (quoting *Catlin v. United States*, 324 US 229, 233 (1945)).

In a long line of decisions, this Court nonetheless has permitted immediate appeals from various interlocutory district court orders, deriving a three-part test from *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541 (1949). "First, the order must 'conclusively determine the disputed question.' Second, the order must 'resolve an important issue completely separate from the merits of the action.' Third and finally, the order must be 'effectively unreviewable on appeal from a final judgment.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 US 271, 276 (1988) (citations and quotations omitted). This test "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a "practical construction' of it." *Digital Equip. v. Desktop Direct*, 511 US 863, 867 (1994).

All three elements of the *Cohen* doctrine are met in this case.

I. Immediate Appeals Of Attorney Sanctions Orders Satisfy The Three *Cohen* Criteria.

A. The District Court's Sanctions Order "Conclusively Resolved" Petitioner's Liability For Sanctions.

The majority below acknowledged that "the first *Cohen* factor," the appealed-from order must conclusively determine the disputed question, "is satisfied here." App. 43. That conclusion is inescapable. The sanctions order was definitive and immediately executable. The magistrate judge imposed the sanction upon Petitioner and the district judge affirmed. Neither gave any indication that they contemplated revisiting the matter at a later date. As a result, Petitioner "conclusively" was obligated to pay Respondent a sanction of $1494. The district specifically did not enter a stay at that time, despite Petitioner's express request.

After Petitioner appealed, the district court entered a stay of collection, but that makes no difference. District courts

frequently impose stays while cases are on appeal, as Federal Rule of Appellate Procedure 8 expressly contemplates. But once the appeal has been lodged, such a stay can not retroactively render the appealed-from order nonfinal.

Nor does the district court's inherent authority to revise or amend the sanction render it nonappealable. This Court has "contrasted two kinds of nonfinal orders: those that are 'inherently tentative' and those that, although technically amendable, are 'made with the expectation that they will be the final word on the subject addressed.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, *supra*, 485 US at 277 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 US 1 (1983)). The former are appealable; the latter are not. *Id.* Thus, an order determining that a defendant is not entitled to qualified immunity is appealable under the *Cohen* doctrine, despite the fact that the district judge could change her mind at a later date. *Johnson v. Jones*, 515 US 304, 312 (1995). Similarly, unless the district court itself indicates that the sanction is tentative, the order remains appealable notwithstanding that the district judge conceivably could modify it at a later date.

B. The District Court's Sanctions Order Resolved An Important Question That Is Completely Separate From The Merits Of The Case.

The court of appeals held that attorney sanctions orders are not immediately appealable because, contrary to the second element of the *Cohen* test, they do not resolve an important question completely separate from the merits. The majority did not doubt that the sanction raised a sufficiently "important" question. Instead, it viewed Petitioner's appeal as impermissibly intertwined with the merits. App. 45.

The court of appeals' decision squarely conflicts with two decisions of this Court, which hold that attorney sanctions are collateral to the merits of the underlying litigation. *Cooter &*

Gell v. Hartmarx Corp., 496 US 384 (1990), held that attorney sanctions may be imposed after the action is dismissed precisely because they are collateral to the merits. In that decision, the Court first traced its earlier precedents holding that requests for attorney's fees are collateral to the merits:

> It is well established that a federal court may consider collateral issues after an action is no longer pending. . . . This Court has indicated that motions for costs or attorney's fees are "independent proceedings supplemental to the original proceeding and not a request for modification of the original decree." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939). Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451 n.13 (1982).

Id. at 395-96.[4] The Court then explained that the same holds true of requests for sanctions:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

Id. at 396. Similarly, in *Willy v. Coastal Corp.*, 503 US 131, 137 (1992), the Court relied on *Cooter & Gell* to hold that district courts may impose sanctions even after dismissing the

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[4] *See also Budinich v. Becton Dickinson & Co.*, 486 US 196, 199-200 (1988) ("As a general matter, at least, we think it is indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain."); *FCC v. League of Women Voters*, 468 U.S. 364, 373 (1984) ("whether appellees were entitled to recover attorney's fees and costs" is a "wholly collateral issue"); *Trustees v. Greenough*, 105 U.S. 527, 531 (1881).

underlying action for lack of subject matter jurisdiction because, once again, sanctions are "collateral to the merits."

This Court's conclusion that attorney sanctions orders are collateral to the merits is borne out by this case. The magistrate judge evaluated the discovery requests promulgated by Respondent as well as the magistrate's own order scheduling depositions. The magistrate then considered whether Petitioner had followed the scheduling order and submitted sufficient discovery responses. Finding that she had not, the magistrate concluded that Respondent was entitled to a certain amount in attorney's fees based on Petitioner's failure to abide by discovery rulings. In doing so, the magistrate applied a legal standard, and evaluated a legal question, that do not touch in any respect on Respondent's liability for Casey's death.

The Sixth Circuit's contrary view reads *Cohen*'s reference to appeals that are "intertwined with the merits" to mean that no immediate appeal may be taken from any district court order that overlaps with the parties' substantive claims. That exceptionally restrictive view of appealability is not correct. The purpose of the separability requirement is to ensure "that review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending)." *Johnson v. Jones*, 515 US 304, 311 (1995). But many district court orders that relate to the merits can be appealed without resulting in duplicative review or stays of the district court proceedings.

This Court accordingly has *rejected* the more narrow view expressed by the Sixth Circuit in this case that "any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Mitchell v. Forsyth*, 472 US 511, 529 n.10 (1985). Even if an order is "practically intertwined with the merits," it is

appealable if it "nonetheless raises a question that is significantly different from the questions underlying [the] plaintiff's claim on the merits." *Johnson v. Jones*, *supra*, 515 US at 314 (emphasis added). Thus, "the *Cohen* 'separability' component asks whether the question to be resolved on appeal is '*conceptually distinct from the merits of the plaintiff's claim*.' The appropriate comparison, then, is between the decision sought to be reviewed and the claim underlying the action itself." *Behrens v. Pelletier*, 516 US 299, 309 n.3 (1996) (quoting *Mitchell v. Forsyth*, *supra*, 472 US at 527) (emphasis added).

The court of appeals' failure to apply the correct legal standard is plain from several of this Court's precedents. For example, in permitting appeals from the denial of qualified immunity, the Court has acknowledged that "the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief." *Mitchell v. Forsyth*, 472 US 511, 528 (1985). The Court in fact emphasized that "the same is true" with regard to other immediately appealable orders, such as "when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause." *Id.* Similarly, a district court's decision to stay or remand a case pending state court litigation is immediately appealable, despite the fact that such a decision involves a substantial analysis of the facts of the case. An immediate appeal is permitted because, notwithstanding this inquiry into the facts, the district judge resolves the separate question "whether the federal court should decline to exercise its jurisdiction in the interest of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 517 US 706, 714 (1996).

The separateness of a sanction from the merits strongly counsels in favor of permitting immediate appeals. An immediate appeal will not "waste judicial resources by

requiring repetitive appellate review of substantive questions in the case." *Van Cauwenberghe v. Biard*, 486 US 517, 527-28 (1988). Nor is there any realistic chance that the attorney will become less likely to seek appellate review as the case proceeds to final judgment, thereby rendering the issue "moot or irrelevant by the end of trial." *Stringfellow v. Concerned Neighbors In Action*, 480 US 370, 380 (1987). The sanction order is imposed upon the attorney personally, and the calculus of the risks and benefits of appeal will not be changed by a decision on the merits.

C. The District Judge's Sanction Order Was "Effectively Unreviewable" On Appeal From The Final Judgment.

The Sixth Circuit only briefly discussed the third element of the *Cohen* doctrine: that the district court's order be "effectively unreviewable" on appeal. According to the majority opinion, Petitioner should have and could have filed her notice of appeal from the final judgment later entered in the underlying case. App. 48. That is not correct. Petitioner could not appeal the final judgment because she was not a party to the case and the judgment did not otherwise operate upon her. The Sixth Circuit's holding that Petitioner could not appeal directly from the sanction thus means that she could not appeal at all, which cannot be the law.

1. Only Parties May Appeal A Final Judgment.

"The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 US 301, 304 (1988) (per curiam) (citing *United States ex rel. Louisiana v. Jack*, 244 US 397, 402 (1917); FRAP 3(c) ("The notice of appeal shall specify the party or parties taking the appeal.")). In *Marino v. Ortiz*, for example, the Court unanimously concluded that a group of white police officers who had not intervened in the district court could not appeal the entry of a consent decree

resolving a discrimination suit. In *Karcher v. May*, 484 US 72 (1987), the Court unanimously concluded that legislators could not appeal a district court's judgment individually when they had participated in the district court only in their official capacities. As Justice O'Connor's opinion for the Court in the *Karcher* case explains, "we have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Id.* at 77.

This is not to say that only the persons named in the caption of the judgment may appeal. But the appellant must be the equivalent of a litigant, *i.e.*, she must have "participated as if [a] part[y]." 15 Wright et al., *Federal Practice & Procedure*, § 3902.1; *id.* ("Most of these appeals involve persons who participate in trial court proceedings as if they had intervened, and who seem to have been treated on all sides as de facto parties.") Thus, in *Williams v. Morgan*, 111 US 684, 698-99 (1884), the Court recognized that "quasi parties" who, "incidentally interested in some branch of a cause have been allowed to intervene for the purpose of protecting their interest, and even to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." Similarly, *Blossom v. Milwaukee RR Co.*, 68 US (1 Wall.) 655, 656 (1863), recognized that "other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders." *See also Kneeland v. American Loan & Trust Co.*, 136 US 89, 93-94 (1890); *Hovey v. McDonald*, 109 US 150, 155 (1883); *Hinckley v. Gilman, Clinton, & Springfield RR Co.*, 94 US 467, 469 (1876).

The rule against nonparty appeals has existed for as long as the "final judgment" rule itself. As we discuss further below, the Court in 1857 held that a party's attorney may not appeal from the final judgment. *Platt v. Jerome*, 60 US (19

How.) 384. Subsequently, in *United States ex rel. Louisiana v. Jack*, 244 US 397 (1917), the Court explained:

> With exceptions not even remotely applicable to a case such as we have here it has long been the law as settled by this court that "no person can bring a writ of error [an appeal is not different] to reverse a judgment who is not a party or privy to the record," *Bayard v. Lombard*, 9 How. 530, 551, and in *Ex parte Tobacco Board of Trade*, 222 U.S. 578, it was announced, in a per curiam opinion, as a subject no longer open to discussion, that "one who is not a party to a record and judgment is not entitled to appeal therefrom" . . . .

Id. at 402 (insert in original); *accord International Union v. Scofield*, 382 US 205, 208-09 (1965); *Elwell v. Fosdick*, 134 US 500, 513 (1889); *Ex Parte Cockroft*, 104 US 578, 578-79 (1881); 15A Wright et al., *Federal Practice & Procedure*, § 3902.1 (1992 ed.) ("The basic rule that a nonparty cannot appeal the judgment in an action between others is well established.").

The bar to nonparty appeals thus qualifies the general rule that an appeal may be brought only from a final judgment. "The statutory requirement of a 'final decision' means that '*a party* must ordinarily raise all claims of error in a single appeal following final judgment on the merits.'" *Richardson-Merrell v. Koller*, 472 US 424, 429-30 (1985) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368, 374 (1981)) (emphasis added). Thus, "the final-judgment rule requires that except in narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal, *litigants* must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review." *Van Cauwenberghe v. Biard*, *supra*, 486 US at 524 (emphasis added) (citation omitted); *accord Quackenbush v. Allstate Ins. Co.*, 517 US 706, 712 (1996); *Digital Equip. Corp. v. Desktop Direct*, 511 US 863, 867 (1994).

2. Nonparties, Such as Petitioner, May Appeal Only Those Orders Punishing Them Directly.

The Sixth Circuit's decision that Petitioner could not appeal directly from the sanction order has the effect of preventing her, as a nonparty, from appealing at all. But that cannot be the law. If a nonparty may not appeal from the final judgment, she must be permitted to appeal directly from orders, such as sanctions, which impose direct burdens and are not incorporated into the final judgment.

Such nonparty appeals clearly are not prohibited by 28 USC 1291, which establishes jurisdiction over every "final decision" of the district courts without regard to whether the decision is directed to a litigant. Nor is there a policy reason for prohibiting nonparty appeals. District courts have expansive authority to command actions by nonparties within their jurisdiction, including through orders that impose substantial and immediate burdens. *E.g.*, *United States Catholic Conference v. Abortion Rights Mobilization*, 487 US 72 (1988) (addressing daily fine of $50,000 imposed on third party for failure to produce documents). If only parties could file an appeal, such orders would be unreviewable and great injustice could result. On the other hand, frequent appeals by third parties, for example contesting the issuance of subpoenas, could disrupt the orderly progress of trial court proceedings.

This Court's precedents balance these competing considerations. Most district court orders to third parties involve discovery requests. It is settled that a nonparty, like a party, has no right to appeal from a mere discovery subpoena. But unlike a party,[5] if a nonparty refuses to produce materials as ordered by the court, she may incur punishment by the court

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[5] *See Fox v. Capital Co.*, 299 US 105 (1936) (civil contempt not appealable by party); *Doyle v. London Guarantee & Accident Co.*, 204 US 599 (1907) (same).

and then challenge the order in an immediate appeal.[6] Thus, this Court held in *Alexander v. United States*, 201 US 117 (1906):

> [A subpoena] may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. . . . *This power to punish being exercised the matter becomes personal to the witness and a judgment as to him.* Prior to that the proceedings are interlocutory in the original suit.

201 US at 121-22 (emphasis added). The majority below specifically acknowledged the holding of *Alexander* but held that *Alexander* is limited to instances in which the third party specifically is cited for contempt. App. 41-42.

The Sixth Circuit's narrow view of *Alexander* is incorrect. *Alexander*'s statement that a finding of "contempt" against a third party is appealable (201 US at 121), was not intended to distinguish contempt from other sanctions. At the time *Alexander* was decided, the Federal Rules of Civil Procedure, including their provisions for sanctions, had not yet been enacted. Instead, a finding of contempt illustrated why the Court permitted appeals from district court orders exercising

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[6] Of course, the normal rules of finality continue to apply. The court's order is appealable only if it is definite: "So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen v. Beneficial Indus. Loan Corp.*, 337 US 541, 546 (1949). In addition, the order must be unrelated to the merits of the case such that it will not "merge" into the final judgment. *Behrens v. Pelletier*, 516 US 299, 305 (1996).

the "power to punish," but not from mere subpoenas. There is no question that a sanction upon an attorney similarly is an exercise of the "power to punish" and furthermore is "personal to the" attorney.

Two other cases decided in the same period demonstrate that *Alexander*'s holding extends beyond appeals of contempt sanctions. *Webster Coal & Coke Co. v. Cassett*, 207 US 181 (1907), refused to permit an appeal from an order directing third parties to produce various documents. As in *Alexander*, the Court concluded that an appeal would be permitted if the third parties disobeyed and were punished. But *Webster Coal* made clear that the right to appeal arose from the "independent" nature of the proceeding against the third party, not a finding of "contempt":

> The order as to [the third parties] was purely interlocutory, not imposing penalty or liability, and not finally disposing of an independent proceeding.
>
> * * * *
>
> This order [to produce] affected the plaintiff and defendant in the case itself, and not the [third parties] as individuals at all, and if the court had power to punish disobedience or enforce compliance then the order prior to such action on the part of the court was clearly interlocutory in the suit.
>
> * * * *
>
> There was here no attachment for contempt, no judgment on default, and no independent and collateral proceeding, the order disposing of which could be considered as a final decree.

Id. at 186-87.

The Court applied another rationale to reach the same result in *Bessette v. W.B. Conkey Co.*, 194 US 324 (1904). There, the Court permitted an appeal by a third party who had been fined $250 for contempt of court. But *Bessette*, like

Alexander, did not turn on any characteristic unique to contempt proceedings. Instead, the Court permitted an immediate appeal because any appeal from the "final decree" in the case "would not have brought up the proceeding against the petitioner, for he was not a party to the suit." *Id.* at 329. The same principle applies here, as Petitioner was not a party to the underlying suit and accordingly could not appeal from the final judgment.

Although the Court has reiterated that a finding of contempt suffices to trigger a third party's right to appeal (*United States Catholic Conf. v. Abortion Rights Mobilization*, 487 US 72, 76 (1988)), it never has held that a contempt is required. To the contrary, *United States v. Ryan* refused to permit a third party to appeal from a grand jury subpoena, explaining that if "the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt *or similar proceedings* are brought against him." 402 US 530, 532 (1971) (emphasis added). Sanctions and contempt certainly are sufficiently "similar" for these purposes, as both give rise to collateral proceedings that cannot be appealed by the third party upon the entry of a final judgment.

Moreover, there is no practical reason to permit appeals of contempt citations, but not sanctions. In both instances, the district court imposes a fine for failure to obey the court's rules. Nor are the issues in an appeal from a contempt order narrower or less related to the merits of the underlying proceeding. In point of fact, both can arise from the *identical* conduct. Thus, FRCP 37(b)(2) provides that the identical failure to adhere to a discovery ruling, may trigger a finding of "contempt of court" or an order requiring payment of "reasonable expenses, including attorney's fees." No consideration underlying this Court's finality jurisprudence justifies permitting an appeal in the former instance but not the latter.

In point of fact, there is a vital reason not to require an attorney to place herself in contempt of court before appealing. Such a rule would create a grave conflict of interest. The attorney would have a substantial, personal incentive to defy the judge's ruling and incur a contempt sanction in order to secure a right to appeal. But by purposefully engaging in contempt of a binding court order, the attorney breaches her own obligations to the court and also potentially prejudices her client in the eyes of the judge.[7]

3. Attorneys Are Nonparties For Purposes Of The Right To Appeal.

Attorneys are "nonparties" for purposes of determining whether they must appeal from the final judgment or instead directly from a sanctions order. An attorney is not subject to the final judgment. Instead, she serves as a officer of the court in the proceedings and, absent an express provision to the contrary, is not subject to the judgment, which cannot be executed against her. The judgment has no collateral estoppel effect upon the attorney or other clients of the attorney who were not involved in the case. With respect to the finality of the judgment, therefore, the attorney is no different than any other third party.

Nor is the attorney a proxy for her client. Thus, *Platt v. Jerome*, 60 US (19 How.) 384, 385 (1857), held that a plaintiff's attorney could not maintain an appeal that had been dismissed pursuant to a settlement between the parties:

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[7] An immediate appeal vindicates two other interests that are not "effectively unreviewable" after the final judgment. Sanctions, which are designed precisely to highlight the attorney's failure to fulfill her professional and ethical responsibilities to the court, have an immediate, stigmatic effect that the attorney must bear throughout the case. In addition, particularly when large sums are involved, the attorney may be unable to secure repayment if the sanction is reversed on appeal after a substantial delay.

> The attorney . . . . is not a party to the suit, nor does he stand in the place of the party in interest. He is in no way responsible for the costs of the proceedings, and to permit him to control them would, in effect, be compelling the client to carry on the litigation at his own expense, simply for the contingent benefit of the attorney.

Similarly, the Court will not permit an attorney to a party to appeal on behalf of a third party. Thus, *United States ex rel. Louisiana v. Jack*, *supra*, 244 US 397, held that the Attorney General of Louisiana could not appeal on behalf of the State from a judgment in which he had represented a state instrumentality. The reverse is true as well: a party may not appeal an order entered against his attorney. *Grant & Burlingame v. United States*, 227 US 74, 78.

Where, as here, the sanctioned attorney no longer is serving as counsel in the underlying litigation, she certainly cannot be characterized as a "party" for purpose of appeal. An attorney who has withdrawn or been disqualified has no right whatsoever to control or to participate in the suit. Of particular concern, the case may settle entirely without the sanctioned attorney's knowledge, defeating the attorney's right to appeal. No final judgment ever may be entered, rendering an appeal impossible. Alternatively, the attorney may be unaware of the settlement at the time it is entered, and therefore may fail to file a notice of appeal in time through no fault of her own.

II. Immediate Appeals Of Attorney Sanctions Orders Are Consistent With The Policies Underlying The Final Judgment Rule.

A. The District Court Retains Discretion Over The Course Of The Proceedings And Specifically Over Whether An Immediate Appeal Will Be Permitted.

Permitting an immediate appeal on these facts will in no way deprive district courts of control over either the

administration of their proceedings or the ability of the attorneys to take such an appeal. If, as here, the district court conclusively imposes an immediately executable separate sanction without regard to its later entry of the final judgment or some further determination of the sanction, the order is immediately appealable. But the district court can determine instead that the sanction will be incorporated into the final judgment to be enforceable at that time. In that instance, the attorney will not be subject to execution on a sanction order prior to final judgment, but instead will be a party to the final judgment with a right to appeal from it. Alternatively, the district court can state that the amount of the sanction will be finalized at the close of the case, at which time the attorney can appeal from the sanction order. The court of appeals, in turn, has the option of consolidating any appeal by the attorney with the parties' appeal(s) on the merits. *See* FRAP 3(b).

Petitioner's view is consistent with both this Court's precedents and the practice of several circuits. This Court has long cautioned that district courts generally should refrain from entering interim money judgments while a suit remains in progress. Thus, as early as *Forgay v. Conrad*, 47 US (6 How.) 201 (1848), the Court held that an order requiring the immediate transfer of property or payment of money to a party was an appealable "final decree," explaining:

> And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent . . . .

Id. at 204. The Court took care to explain, however, that the right to appeal arose only because the district court had entered a separate, executable decree rather than permitting execution at the end of the case. It emphasized that district court orders

requiring immediate payment in the middle of the case were themselves inconsistent with the "final judgment" rule and therefore should be avoided:

> We, however, feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees [the predecessor language to § 1291], it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal....
>
> .... It is *exceedingly important*, therefore, that the Circuit Courts of the United States, in framing their interlocutory orders, and in carrying them into execution should . . . abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order.

Id. at 205 (emphasis added).

Well reasoned decisions of the courts of appeals favor this approach in the context of attorney sanctions awards. Thus, the Fourth Circuit in *Wheeler v. Anchor Continental*, 622 F.2d 94 (1980) (per curiam), remanded an interlocutory sanction order against the plaintiff's counsel. The court explained that

> absent some special circumstances, any award of attorney's fees prior to final judgment in any case should generally await the termination of the case on the merits, and that any appellate review of such an award should only be had in connection with the review of the final judgment in the case. Such a procedure avoids the interruptions that generally result from interlocutory appeals.

Id. at 95. Similarly, the Federal Circuit in *View Engineering v. Robotic Vision Sys.*, noted and adopted the uniform view of the circuits that a district court order announcing an attorney sanction is not appealable until the amount of the sanction is

finally set. 115 F.3d 962, 964 (1997) (collecting cases from the Second, Third, Fifth, Eighth, Ninth, Eleventh Circuits).[8] Judge Easterbrook's opinion for the Seventh Circuit in *Cleveland Hair Clinic v. Puig*, 104 F.3d 123, 125 (1997), reached the same result, noting that *Liberty Mutual Insurance Co. v. Wetzel*, 424 US 737 (1976), "holds that a decision conclusively establishing liability cannot be appealed until all questions about the amount of damages have been resolved."

The approach we suggest thus balances the interests of district courts in administering their proceedings with the interest of attorneys, who are not parties to the action, in appealing orders with immediate and potentially severe consequences. Under the Sixth Circuit's decision, an attorney may be required to pay immediately a sanction in the thousands of dollars or more with no ability to appeal until the case ends years later. That is manifestly unjust. Except in rare instances, no compelling interest requires that the sanction be paid immediately while the right to appeal is deferred indefinitely. When a district court defers the final determination of sanctions, it can make absolutely clear the seriousness of the attorney's misconduct as well as the amount of the sanction contemplated. The effectiveness of attorney sanctions therefore is not undermined when the "conclusive" determination of the sanctions is deferred until the close of the case.

B. Other Practical Considerations Favor Immediate Appeal.

Unlike many of the interlocutory orders that this Court has considered under the *Cohen* doctrine, attorney sanctions orders

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[8] *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 826-27 (7th Cir. 1984), permitted an immediate appeal before the amount of a sanction was finally determined, but only by consolidating appeals from the sanction and the final judgment in the case.

are rarely appealed immediately. Permitting such appeals therefore will not interfere with orderly judicial administration. *See Behrens v. Pelletier*, 516 US 299, 310 & n.4 (1996) (noting, in permitting appeals of the denial of qualified immunity at both the motion to dismiss and the summary judgment stage, that "successive pretrial assertions of immunity seem to be a rare occurrence"); *Johnson v. Jones*, 515 US 304, 319 (1995) (explaining that "our holding here has been the law in several Circuits for some time," yet "petitioners have not pointed to concrete examples of unmanageability they fear"). The Second Circuit has permitted immediate appeals of attorney sanctions orders for more than fifteen years (*see Cheng v. GAF Corp.* 713 F.2d 886 (2d Cir. 1983)), but according to our research only eight such appeals have ever been brought in that court.[9] In the Seventh Circuit, five appeals have been brought in fifteen years.[10] In the Ninth Circuit, nine appeals have been brought in over twenty years.[11] Even fewer appeals were brought in the

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[9] *Lapidus v. Vann*, 112 F.3d 91 (1997); *Satcorp International Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3 (1996); *McDraw v. CIT Group Equipment Financing, Inc.* 73 F.3d 1253 (1996); *Morley v. CIBA-Geigy Corp.*, 66 F.3d 21 (1995); *Discon v. Nynex.*, 4 F.3d 130 (1993); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (1989); *Sanko Steamship Co. v. Galin*, 835 F.2d 51 (1987); *Cheng v. GAF Corp.* 713 F.2d 886 (1983).

[10] *Serritella v. Markum*, 119 F.3d 506 (7th Cir. 1997); *Cleveland Hair Clinic v. Puig*, 104 F.3d 123 (7th Cir. 1997); *Kotsilieris v. Chalmers*, 966 F.2d 1181 (7th Cir. 1992); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Knorr Brake Corp v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984).

[11] *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (1995); *Telluride Mgmt. Solutions v. Telluride Inv. Group*, 55 F.3d 463 (1995); *Mark Indus. v. Sea Captain's Choice*, 50 F.3d 730 (1995); *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109 (1990) (rev'd in part, dismissed in part); *Aetna Life*

remaining circuits in which they are permitted. *See generally infra* n. 13 (collecting cases).

Immediate appeals by attorneys no longer participating in the case are, necessarily, even more rare. So far as our research reviews, in addition to this case, only eight such appeals have ever been brought.[12] It is difficult to see how this exceptionally small class of appeals can be said to undermine orderly judicial administration.

It is not at all surprising that appeals of sanctions orders are rare: attorneys have substantial incentives to appeal only those sanctions orders most deserving of further review. The great majority of district court orders imposing sanctions go unpublished and therefore do not draw the attention of peers and potential clients. But once the matter is taken on appeal, the court of appeals' opinion will be available in the federal reports or at least through on-line research services. A decision affirming such a sanction can be personally and professionally devastating. Unless the attorney is confident that an injustice

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Ins. Co. v. Alla Medical Servs., 855 F.2d 1470 (1988); *Optyl Eyewear Fashion Int'l Corp. v. Style Co.*, 760 F.2d 1045 (9th Cir. 1985); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 747 F.2d 1303 (1984); *Kordich v. Marine Clerks Assoc.*, 715 F.2d 1392 (1983); *David v. Hooker*, 560 F.2d 412 (1977).

[12] *Law v. National Collegiate Athletic Assoc.* 134 F.3d 1025 (10th Cir. 1998); *Walker v. Housing Authority of Dallas*, 129 F.3d 831 (5th Cir. 1997); *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997); *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989); *Glaser v. Cincinnati Milacron, Inc.*, 808 F.2d 285 (3d Cir. 1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); *Wheeler v. Anchor Continental, Inc.*, 622 F.2d 94 (4th Cir. 1980); *David v. Hooker*, 560 F.2d 412 (9th Cir. 1977).

has occurred in the district court, she is quite unlikely to take the matter on appeal.

Experience also shows that immediate appeals of attorney sanctions orders consistently have corrected district court errors. In more than two-thirds of such cases, the court of appeals reversed or vacated the attorney sanction in whole or in part.[13] Without immediate review, the attorneys in those cases

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[13] The court of appeals reached the merits and reversed or vacated the award of sanctions in whole or part in the following cases. *Law v. National Collegiate Athletic Assoc.* 134 F.3d 1025 (10th Cir. 1998); *Walker v. Housing Authority of Dallas*, 129 F.3d 831 (5th Cir. 1997); *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997); *Lapidus v. Vann*, 112 F.3d 91 (2d Cir. 1997); *Satcorp International Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3 (2d Cir. 1996); *McDraw v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253 (2d Cir. 1996); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995); *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group*, 55 F.3d 463 (9th Cir. 1995); *Mark Indus. v. Sea Captain's Choice, Inc*, 50 F.3d 730 (9th Cir. 1995); *Chaves v. M/V Medina Star*, 47 F.3d 153 (5th Cir. 1995); *Discon v. Nynex.*, 4 F.3d 130 (2d Cir. 1993); *Kotsilieris v. Chalmers*, 966 F.2d 1181 (7th Cir. 1992); *Riverhead Savings Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990); *Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Sanko Steamship Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Glaser v. Cincinnati Milacron, Inc.*, 808 F.2d 285 (3d Cir. 1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985); *Knorr Brake Corp v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1984); *Cheng v. GAF Corp.* 713 F.2d 886 (2d Cir. 1983).

The court of appeals reached the merits and affirmed the award of sanctions in the following cases. *Serritella v. Markum*, 119 F.3d 506 (7th Cir. 1997); *Morley v. CIBA-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989); *Thomas E. Hoar, Inc v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989); *Ortho Pharmaceutical Co. v. Sona Distributors*, 847 F.2d 1512 (11th Cir. 1988); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Optyl*

would have been required to pay sanctions immediately, and the sanctions would have remained uncorrected potentially for *years* as the litigation continued in the district court.

Nor do appeals of sanction awards against attorneys impose adverse effects upon the district court. As the Court explained in a related context, "deeming" the sanction and merits to be separate "does not render the [sanctions] appeal more disruptive of ongoing proceedings, more likely to eliminate a trial judge's opportunity for reconsideration, more susceptible to being mooted by settlement, or in any way (except nominally) a more piecemeal enterprise." *Budinich v. Becton Dickinson & Co.*, 486 US 196, 202 (1988) (holding that requests for attorney's fees are collateral to the merits of the underlying case). In addition, an appeal of an attorney sanctions order does not result in a stay of district court proceedings. *Compare, e.g., Richardson-Merrell, Inc. v. Koller*, 472 US 424 (1985) (holding attorney disqualification orders nonappealable because, *inter alia*, they generally lead district courts to stay the underlying proceedings). Thus, neither the majority below nor Respondent has identified any detrimental effect from Petitioner's appeal on the progress of the underlying case, which proceeded unabated to final judgment.[14]

Eyewear Fashion Int'l Corp. v. Style Co., 760 F.2d 1045 (9th Cir. 1985); *David v. Hooker*, 560 F.2d 412 (9th Cir. 1977).

[14] Even if the court of appeals was correct in holding that it lacked jurisdiction over Petitioner's appeal, it nonetheless should have asserted jurisdiction under FRAP 4(a)(2). The Sixth Circuit concluded that Petitioner should have appealed from the final judgment rather than the earlier sanctions order. In other words, Petitioner appealed to early. But Rule 4(a)(2) is intended precisely to accommodate notices of appeal filed early and in good faith. "A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit in this case be reversed.

Respectfully submitted,

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Here, Petitioner filed her notice of appeal in absolute good faith based on the overwhelming majority rule that an immediate appeal is permissible. The Sixth Circuit easily could have deemed Petitioner's appeal to be timely filed from the final judgment under Rule 4(a)(2) without any disruption of either the district court or appellate proceedings. There is no reason at all to construe the Rules of Appellate Procedure in order to defeat Petitioner's right to appeal. *Accord Firstier Mortgage Co. v. Investor Mortgage Ins. Co.*, 498 US 269 (1991) (although noting on the facts of that case that Rule 4(a)(2) applies "only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment," emphasizing that the "litigant's confusion [was] understandable" and that "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal.").

(5)

Supreme Court, U.S.
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MAR 24 1999
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No. 98-727

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

TERESA L. CUNNINGHAM,
Petitioner,

v.

HAMILTON COUNTY, OHIO,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

When may an attorney appeal a sanctions order: (i) not until final judgment (the rule in the Sixth and Tenth Circuits); (ii) immediately, *so long* as *she* is no longer participating in the case (the rule in the Fifth Circuit); (iii) immediately, *so long* as *she* is no longer participating *and* the appeal is not intertwined with the merits of the case (the rule in the Third Circuit); (iv) immediately, *so long as* the sanction is "significant" (the rule in the Eleventh Circuit); or (v) immediately, without conditions (the rule in the Second, Seventh, Eighth, and Ninth Circuits, but rejected by the First, Fourth, and Federal Circuits)?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Plaintiffs Darwin Lee Starcher and Kathy Brown and Defendants-Appellees Correctional Medical Systems, Inc., Simon Leis, Sally Remillard, and Joseph Spriggs were parties to the proceedings below.

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BRIEF FOR THE RESPONDENT

The Respondent concurs with and adopts the Petitioner's descriptions of jurisdictional and the statutory provisions involved in this matter.

STATEMENT OF THE CASE

The sole issue in this case is whether an attorney may immediately appeal a Civil Rule 37 sanctions order. Petitioner Teresa Cunningham was plaintiff's counsel in a federal lawsuit against Respondent Hamilton County and Correctional Medical Services, Inc. (hereinafter CMS). The District Court ordered her to pay Hamilton County $1,494.00 for costs resulting from her "egregious" discovery violations, but stayed the order pending a final judgment. Cunningham appealed at once to the Sixth Circuit Court of Appeals. The court directed the parties to brief the issue of whether the sanctions order was an appealable order.

During the pendency of that appeal, the District Court entered a final order dismissing the plaintiff's case. The plaintiff appealed on the merits, but neither the plaintiff or Cunningham appealed the sanctions order, despite the questioned validity of Cunningham's earlier pending appeal, and the risk that it could be dismissed. Cunningham did not join in the appeal on the merits. Cunningham's interlocutory appeal of the sanctions order was later dismissed by the Sixth Circuit, for lack of jurisdiction. Because she failed to raise the sanctions issue in the appeal from the final order of judgment, the sanctions issue was waived.

A. The Underlying Litigation

The underlying case arises from the suicide of Casey Starcher while incarcerated at the Hamilton County Justice Center. Petitioner Cunningham filed the lawsuit on behalf of Casey's father, Darwin Starcher. (Darwin Starcher died during the course of the litigation and his daughter was substituted as a plaintiff). Casey Starcher had been transported to the Hamilton County Justice Center for a post-conviction hearing[1], at which his motion for relief was denied. The Complaint alleged that Hamilton County and its co-defendant Correctional Medical System, Inc. (a subcontractor providing medical services at the Justice Center), failed to prevent Starcher from committing suicide.

The Magistrate Judge issued a scheduling order on March 18, 1996. Among other things, the order required the Plaintiffs to identify their expert witnesses and materials not later than June 7, 1996, and the Defendants to do so not later than July 19, 1996. On May 29, 1996, the Defendants served interrogatories and document requests. Cunningham informed defense counsel that she could not respond to the discovery requests because the Plaintiff, Darwin Starcher, had died. Efforts to resolve the matter informally were to no avail. Given the proximity of their own disclosure date, the Defendants filed a motion to compel the Plaintiff to respond to the interrogatories and document production requests.

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[1] Starcher had previously pled guilty to and been convicted of four felonies in the Hamilton County Court of Common Pleas: aggravated robbery, escape, receiving stolen property and unlawful possession of a dangerous ordnance. Petitioner also represented Starcher in the post-conviction motion.

Magistrate Judge Cook conducted a discovery conference on July 10, 1996, seeking to resolve these and other pending discovery disputes. The Magistrate Judge ordered the Plaintiff to provide full and complete responses to the discovery requests by July 12, 1996. Further, the Magistrate Judge ordered that depositions of two witnesses for the Plaintiff and of two Defendants be held on July 25, 1996, subject to the condition that the Defendants' depositions would go forward only if Plaintiff had complied with his order to produce the written discovery by July 12. *Jt. App.* 1, Doc. 27.

The Petitioner ignored both directives. She responded instead with objections, incomplete responses to some of the interrogatories and no response at all to others. She produced none of the requested documents. Notwithstanding the Magistrate Judge's express order, with its specific dates, Petitioner Cunningham, unilaterally, sent notice to the defendants that one of her witnesses' deposition would take place in Indianapolis, Indiana on July 22, not July 25, as set out by the Magistrate Judge's order. This conduct led to motions for protective orders and sanctions by the defendants and cross motions by the plaintiff.

B. Sanctions Imposed by the Magistrate Judge for "Egregious" Conduct of Counsel.

On July 19, 1996, the Magistrate Judge held a hearing on the discovery motions. Although Petitioner now complains about notice of that hearing, she did attend and made neither an objection nor a motion for additional time to prepare. The Magistrate Judge denied Plaintiff's motions and granted Defendants's motions, finding Petitioner's conduct "egregious." *Jt. App.* 20. He ordered Cunningham to provide full and complete responses to the discovery requests

within ten days, and granted the Defendants' motion for protective order concerning the depositions of the two individual defendants, pending compliance with the discovery order.

The Magistrate Judge also granted the Defendants' motions for sanctions under Fed. R. Civ. P. 37 and instructed defense counsel to submit a statement indicating their reasonable fees and expenses. The Petitioner was subsequently ordered to pay the Treasurer of Hamilton County, Ohio, $1,494.00,[2] representing costs and attorney fees incurred by the Office of the Hamilton County Prosecuting Attorney, as counsel for the County Defendants. *Jt. App.* 21 Petitioner was also ordered to pay $2,432.00 to the law firm representing the co-defendants, but that order has not been appealed.

C. The District Court's Order Affirming the Sanctions.

Petitioner and her client objected to the Magistrate Judge's orders. U.S. District Court Judge Sandra S. Beckwith affirmed the sanctions by Order on October 22, 1996, but granted a stay pending final disposition. (The sanctions have yet to be paid.) The Court also disqualified Cunningham because she was a key fact witness regarding a discussion she alleged she had with Joseph Spriggs, a named defendant and an employee of CMS. *Jt. App.* 22-32. That discussion was the linchpin of Plaintiff's claim that the Defendants had been given notice that Starcher was at risk to

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[2] The Sixth Circuit Court of Appeals cites the sum of $1,690.50. As Petitioner noted in her brief, that is incorrect. The Magistrate Judge reduced the requested amount to $1,494.00. The sanctions awarded to the other defendants were later settled.

commit suicide.

The Petitioner's involvement in the underlying case did not end, however. The District Court imposed additional monetary sanctions, in the amount of $29,000.00, against her on March 23, 1998, payable to CMS. *Jt. App.* 8, Doc. 200. She remained active, as well, contesting various orders directed to her by the Court. *Jt. App.* 6-9, Doc. Nos. 133-219. Although Cunningham appealed the later sanction against her, she did not join in the appeal on the merits or ask the Court of Appeals to consolidate the three (3) pending appellate cases.

D. The Decision by the Court of Appeals

The Petitioner appealed to the United States Court of Appeals for the Sixth Circuit from the District Court's first order imposing sanctions. The Defendants moved to dismiss the appeal on the ground that the sanctions order was not a final, appealable order, as required by 28 U.S.C. § 1291. The Sixth Circuit acknowledged a split among the Circuits on the question of whether interlocutory awards of sanctions against a party's attorney is immediately appealable.[3] Consequently, the parties were ordered to address the issue in their merit briefs. *Jt. App.* 33-34. Thus Petitioner was on notice as to the questioned jurisdiction of the Court of Appeals, and briefed the issue to the Sixth Circuit, several months before the district court granted summary judgment on the merits of the underlying case. *Jt. App.* 7, Doc 187.

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[3] A Sixth Circuit order denying the initial motion to dismiss, refers to sanctions under Rule 11 of the Federal Rules of Civil Procedure. In fact, sanctions were imposed against Petitioner, pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure. *Jt. App.* 16.

The circuit court ultimately concluded that it had no jurisdiction and dismissed Cunningham's appeal. *Starcher v. Correctional Medical Sys., Inc.*, 144 F.3d 418 (6th Cir. 1998). The court held that the sanctions order was not a final appealable order, and did not satisfy the second element of the *Cohen* doctrine which requires that to be excepted from the final judgment rule the order in question must resolve an important issue completely separate from the merits. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The court also concluded that an appeal after a final resolution of the underlying case and Cunningham's status as former counsel would not render effective review impossible.

SUMMARY OF ARGUMENT

An order imposing sanctions on a party's attorney is not a final order that can be appealed pursuant to 28 U.S.C. § 1291, and does not fall within any recognized exception to the rule. Even when such an order directs the Petitioner to pay fees, costs or other financial penalties, it does not satisfy each of the criteria of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Indeed, it is at least arguable that sanctions orders satisfy *none* of those criteria.

For example, while both the parties and the Court below considered it effectively "beyond dispute that the first *Cohen* factor is satisfied here," that is not necessarily so. At least one circuit has challenged the assumption that merely establishing an amount certain for the sanction provides a conclusive determination of the matter.[4] Subsequent

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[4] *In Re Licht & Semonoff*, 796 F.2d 564, 570 (1st Cir.1986)

developments could result in the order's modification prior to final judgment on the merits. The court might rescind it, reduce it or increase it. Therefore, even a specific dollar figure may not, in fact, satisfy the requirement that the order determine the disputed question conclusively.

Second, this case does not involve an "important right" that is completely separate from the merits of the underlying action. Instead, Petitioner calls on appellate courts to review, for abuse of discretion, a factually driven decision which is inextricably entwined with the facts of the underlying case. Any "right" that might be implicated if Petitioner is required to wait until the end of the main case before seeking appellate review of her sanctions, will not be irreparably harmed. Indeed, in view of the stay granted by the District Court, Petitioner has suffered no harm in this case.

Finally, there is no reason a sanctioned attorney cannot appeal the sanction in her own right and on her own behalf at the case's conclusion. This is so irrespective of whether she still represents the client.

The efficient administration of justice will be best served by a single appellate review, where all issues raised by the case can be fully reviewed and decided. An interlocutory appeal of the District Judge's decision will undermine the authority of the District Court and will impose unreasonable disruption, delay and expense on the parties.

ARGUMENT

Generally, a party may not take an appeal under 28 United States Code, Section 1291 until there has been a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute

judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988). "[R]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in a practical consequence, but a single controversy." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978).

Allowing the interlocutory appeal of sanctions imposed under Rule 37 will create additional dangers, as recognized by the Third Circuit in *Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981), that:

> [T]o permit an immediate appeal would be to undermine Rule 37(a)(4). If every sanction imposed to deter delay were immediately appealable, a litigant could forestall resolution of its case almost indefinitely, or for so long as the trial judge sought to impose sanctions. The Court's only recourse would be to withhold sanctions, but doing so would negate any effect Rule 37(a)(4) could ordinarily have...the possibilities for delay are equally great if an attorney may immediately appeal any sanctions imposed against himself .... Otherwise, Mr. McIntyre's action would chart a course available to any attorney seeking to delay: voluntary acceptance of the Rule 37(a) sanction followed by an immediate appeal.... A court's response to a rule which would allow immediate appeal by an attorney ...might well be to refuse to sanction attorneys at all. That such an outcome would eliminate what was clearly envisioned as a purpose of Rule 37: a means of sanctioning attorneys who unnecessarily delayed proceedings.

Id. at 948-949 (footnote omitted).

The Court has consistently limited expansion of appellate jurisdiction by restricting interlocutory appeals to only the most important of rights. A pretrial discovery sanction, under Rule 37, is not such a case.

I. A Sanction Imposed On An Attorney During Pretrial Dicovery Is Not A "Final" Appealable Order Under 28 U.S.C. § 1291.

A. The Final Judgment Rule Promotes Efficient Judicial Administration and Avoids Undue Delay.

> Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay and expense. It would also undermine the ability of district judges to supervise litigation. In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by "piecemeal appellate review of trial court decisions which do not terminate the litigation."

Richardson-Merrell inc. v. Koller, 472 U.S. 424, 430 (1985).

The statutory requirement of a final judgment is a logical rule that the courts would have invented had it not been provided by the legislature. Otherwise, a resourceful

litigant could endlessly protract any case and frustrate the efforts of the court to bring the matter to a close. The final judgment rule should not be tampered with unless the issue at stake is grave enough to justify the costs.

This Court has accordingly found few exceptions to the rule. To do otherwise would seriously disrupt the work of the district courts.

> [A]n interlocutory appeal can make it more difficult for trial judges to do their basic job--supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trials simply proceeded, would have turned out to be unnecessary.

Johnson v. Jones, 515 U.S. 304, 309 (1995).

B. Immediate Appeals of Attorney Sanctions Orders Have Not Improved Judicial Efficiency.

This case presents the Court with one of the more troublesome opportunities to create an exception to the rule. Petitioner was sanctioned for violating pretrial discovery orders of the court. The history of the motions and pleadings which led up to the court's order are well described in the record, and had "already consumed an inordinate amount of the court's time," when the District Judge ruled. *Jt. App.* 10-22. If the rule Petitioner proposes had been adopted before

she earned the sanctions brought here, she would have been able to bring appeals from multiple sanctions awards, entwined with the appeal on the merits. There would have been no assurance of consistency in the appellate findings, given that they could well have been proceeding simultaneously.

The Court of Appeals for the Sixth Circuit observed that "several circuits have experimented with the 'immediate appeal' rule urged by Cunningham, and the experience has not been positive." *Starcher,* 144 F.3d at 424. For example, the Second Circuit adopted a rule allowing the immediate appeal of sanctions in *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983). The court recently expressed reservations about its own result:

> The reasoning of those decisions that deny appealability is not without force in view of the salutary policies that animate the final judgment rule. Application of the *Cohen* collateral order doctrine requires careful attention to the facts of each case. In this case, the flurry of arguments, charges and counter-charges, motions and cross-motions and other papers in the district court has effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying trademark litigation. Were we writing on a clean slate, we would be tempted to confine *Cheng* to its unusual facts and characterize the sanctions ordered here as nonappealable under the *Cohen* doctrine.

Lapidus, S.A. v. Vann, 112 F.3d 91, 95-96 (2d Cir. 1997)(footnote omitted).

The Seventh Circuit likewise acknowledged that its cases which permitted immediate appeal by sanctioned attorneys "have not played to universal acclaim." *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997). Accordingly, the court declined to allow a disgruntled attorney an immediate appeal. The Seventh Circuit noted that its earlier rulings could:

> [P]roduce a substantial, and unjustified, erosion of the final decision requirement. It could readily yield three appeals, perhaps more: one to determine whether the defendants in Tinaglia committed sanctionable misconduct; a second to determine whether the District judge properly set the amount of the sanction; then a third to address the merits, which overlap the issues pertinent to sanctions. Multiplication of appeals would delay final adjudication and increase the expense of getting there, without producing material benefits.

id. at 125-126.

The Court of Appeals for the Third Circuit has refused to adopt the immediate appeal rule, now bemoaned by the Second and Seventh Circuits. The court expressed its concerns in *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969), detecting:

> [W]hat appears to be an irresistible impulse on the part of appellants to invoke the "collateral order" doctrine whenever the question of appealability arises. Were we to accept even a small percentage of the sometimes exotic

> invocations, this Court would undoubtedly find itself reviewing more "collateral" than "final" orders.

Id. at 845-846.

Courts forced to revisit the ill-conceived "sanctions" exception to the final judgment rule face a balancing process that pits the need for judicial economy and manageability against the "[H]omeric proportions that such litigation can assume. Our overburdened courts have little time or appetite for such protractions." *Id.* at 846.

C. Exceptions to the Final Judgment Rule Should be Strictly Construed and Limited.

To comply with the Congressional mandate against piecemeal appeals, this Court has construed the exceptions to the final judgment rule strictly. The Court has interpreted the requirements of the collateral order exception with the utmost strictness in criminal cases. *Flanagan v. United States,* 465 U.S. 259, 265 (1984). But the rationale supporting the final judgment rule makes it equally appropriate to strictly construe the rule in civil cases. As Justice Breyer observed in *Behrens v. Pelletier,* 516 U.S. 299, 320 (1996), "this Court and its individual Members have, in recent years, cautioned against expanding the class of orders eligible for interlocutory appeal." The case at hand exemplifies the dangers of allowing pretrial satellite appeals to erupt in the middle of a pending lawsuit. Petitioner appealed from two sanction awards, while the merits continued to run along a parallel track.

The fact that pretrial sanctions might impose a potential hardship does not justify departure from the rule.

Countless non-final orders impose hardships on the parties and their counsel, but do not thereby become appealable. For instance, in *Richardson-Merrell Inc. v. Koller*, this Court acknowledged an order disqualifying counsel may impose significant hardship on litigants and that if the grounds for disqualification were troubling, the hardship may tempt appellate courts to assert jurisdiction pursuant to § 1291. 472 U.S. at 440.

The Court reiterated the words of Judge Adams in *Bachowski v. Usery*, 545 F.2d 363, 373-374 (3d Cir. 1976):

> [I]t would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress.

Richardson-Merrell Inc., 472 U.S. at 440. Certainly where Cunningham is concerned, the immediate "hardship" argument rings false. She has never paid the $1,494.00 sanctions award.

Immediate appeals from interlocutory orders go against the grain of § 1291 and its objective of the efficient administration of justice in federal courts. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-868 (1994). "Narrow" exceptions to the final judgment rule should stay

that way, and not be allowed to swallow the general rule that a party is entitled to single appeal. This Court accordingly has "described the conditions for a collateral appeal as stringent." *Id.* at 868; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989).

D. Congress Has Provided For Interlocutory Appeals Where Necessary and Appropriate to Avoid Injustice.

Congress has provided for the appeal of interlocutory orders in deserving cases. It is telling that in this instance the Petitioner did not attempt to justify her appeal on that basis. Her situation simply does not rise to the level of urgency that has previously impelled Congress or this Court to permit immediate appeal.

A party may seek leave of the court to appeal immediately under the provisions of 28 U.S.C. § 1292(b), which permits an immediate review of an otherwise non-final order which "involves a controlling question of law as to which there is substantial ground for difference of opinion and of an immediate appeal from the order may materially advance the ultimate determination of the litigation." "[T]he availability of § 1292(b) review counsels against expanding other judicial exceptions to the rule against perceived appeals". *Behrens*, 516 U.S. at 322.

Writing for a unanimous Court in *Swint v. Chambers County*, 514 U.S. 35 (1995), Justice Ginsburg discussed at length the statutory evolution of limited exceptions to the final judgment rule, together with those statutes that "counsel resistance to expansion of appellate jurisdiction." *Id.* at 48.

> Congress has thus empowered this Court to clarify when a decision qualifies as "final" for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis. The procedure Congress ordered for such changes, however, is not expansion by court decision, but by rule making under § 2072....*Congress' designation of the rule making process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable warrants the Judiciary's full respect.*

Id. at 48 (emphasis added).

Congress has provided other statutory and procedural alternatives, in addition to § 1292(b), which include Rule 54(b) of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1651, which authorizes federal courts to issue writs of mandamus. *Johnson v. Jones,* 515 U.S. at 304.

E. A Rule Permitting Appeals of Attorney Sanctions Orders Will Inevitably Lead To Vexatious and Disruptive Appeals .

Appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a "particular injustice" averted. *Van Cauwenberghe*, 486 U.S. at 529; *Digital Equip. Corp.*, 511 U.S. at 868. The rule proposed by the Petitioner leads inevitably to appeals in countless subcategories of cases involving sanctions imposed against the parties, solely against counsel, or jointly against the parties and counsel.

Limiting the rule to attorneys no longer participating in the case hinges on a meaningless distinction. *Anyone* — party or attorney, current or former — ordered to pay a monetary sanction today could see that sanction overturned in a later appeal. Moreover, there is no rational way to limit the appeal of trivial orders. Even the mildest of sanctions would be swept up in the immediate appealability rule. If the sanction is monetary, there is no universally meaningful dollar threshold at which the Court could establish a distinction. Non-monetary discovery sanctions defy easy description or categorization. The trial court is simply directed under Fed. R. Civ. P. 37(b)(2) to "make such orders . . . as are just." Is a discovery sanction order foreclosing a defense or prohibiting the introduction of evidence immediately appealable? Why not an order requiring the offending attorney to travel to an inconvenient locale for discovery? These lesser or informal sanctions may cost the attorney time and/or money, but they neither resolve nor terminate the litigation. They are merely steps toward the conclusion of the case, and they can be reviewed effectively upon termination of the litigation.

The more rational approach is simply to adhere to the final judgment rule and permit only those interlocutory appeals that satisfy an existing exception. The most extreme sanctions, such as a dismissal, would be "final orders" from which an immediate appeal could be taken under 28 U.S.C. § 1291.

Appellate courts that have carefully considered the implications of the immediate appeal rule have held that a party may not appeal the sanctions until the case is completed. *Johnny Pflocks, Inc. v. The Firestone Tire & Rubber Co.*, 634 F.2d 1215 (9th Cir. 1980). Likewise, courts have applied the same reasoning when sanctions are imposed jointly against the party and their counsel, holding that appeal is not appropriate

until the final judgment is entered. *Hill v. MacMillan/McGraw-Hill School Co.*, 102 F.3d 422 (9th Cir. 1996).

Judicially created exceptions to the final judgment rule have been carefully limited, and should remain so. The Court has refused to create new exceptions in analogous contexts. For instance, the financial hardship on the disqualified lawyer and client caused by mistaken disqualification is insufficient to set aside the finality requirement imposed by Congress. *Coopers & Lybrand*, 437 U.S. at 476; *Richardson-Merrell Inc.*, 472 U.S. at 436.

Litigants and their counsel will be served better by a "bright-line" rule which requires the parties to raise all issues, including sanctions, by a single appeal, to be taken at the end of the litigation. This policy will save the expense and delays of repeated appeals in the same suit, and "to have the whole case and every matter in controversy in it decided in a single appeal." *McLish v. Roff*, 141 U.S. 661, 665-666 (1891); *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178 (1955).

II. Immediate Appeals Of Attorney Sanction Orders Do Not Satisfy The *Cohen* Criteria.

Faced with a non-final order that falls within no existing exception, Petitioner asks this Court to extend the *Cohen* doctrine to include sanctions orders. *Coopers & Lybrand v. Livesay* held that to come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively

unreviewable on appeal on the final judgment. 437 U.S. at 468.

In *Coopers & Lybrand*, this Court recognized that the finality requirement of § 1291 was an indication of the Congressional intent to restrict appellate review to "final decisions," and to avoid the debilitating effect on judicial administration caused by piecemeal appeals. The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292, the Court reasoned, was enacted by the Congress to meet the need for prompt review of certain non-final orders, but was confined carefully by the Congress to ensure that review would be limited to appropriate cases and avoid time consuming jurisdictional determinations in the Court of Appeals. 437 U.S. at 474-475.

> [C]ongress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicably of savings in time and expense, and to give proper weight to the effect on litigants .... This Court ... is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system....Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money.

Id. at 476.

In considering what types of cases come under the "small class" of interlocutory orders appealable immediately

under *Cohen*, this Court has included only those cases involving the most important of rights. Thus, the Court has reviewed orders denying a motion to reduce bail, because such an order is independent of the issues tried, and unless reviewed before sentence, can never be reviewed at all. *Stack v. Boyle*, 342 U.S. 1 (1952). The Court has permitted appeal of a pretrial motion to dismiss an indictment on double jeopardy grounds because the exposure to a second trial could not be corrected after conviction and sentence. *Abney v. United States*, 431 U.S. 651 (1977). Likewise, the Court has allowed interlocutory appeal in a criminal case to assert the immunity conferred by the Speech or Debate Clause of the Constitution. *Helstoski v. Meanor*, 442 U.S. 500 (1979). *See also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (orders denying immunity to state governmental instrumentalities under the 11th Amendment); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (claims of absolute immunity); and *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (claims of qualified immunity).

In the vast number of cases, however, the Court has declined to allow interlocutory appeals. *See, e.g., United States v. MacDonald*, 435 U.S. 850 (1978) (motion to dismiss an indictment for violation of the Sixth Amendment right to a speedy trial); *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) (prosecutorial misconduct occurring before the Grand Jury); *Johnson v. Jones*, 515 U.S. 304 (1995) (motions for summary judgment based upon qualified immunity which raise factual issues); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (immunity from civil process and *forum non conveniens*); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (order vacating a dismissal predicated on settlement agreement); *Flanagan v. United States*, 465 U.S. 259 (1984) (disqualification of a criminal defense attorney); *Firestone Tire & Rubber Co. v. Risjord*,

449 U.S. 368 (1981) (orders denying disqualification of counsel in civil cases); and *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985) (order disqualifying counsel in a civil case for misconduct).

Appellate courts are properly reluctant to interfere with the pretrial discovery process. *See* Wright, Miller and Cooper, 15B *Federal Practice and Procedure: Jurisdiction 2d.* § 3914.23. Routine appeals from disputed discovery orders would disrupt the orderly process of litigation, swamp the courts of appeals and substantially reduce the district court's ability to control the discovery process. *Id.*

A. The Imposition Of Monetary Sanctions Against An Attorney For Pretrial Misconduct Does Not Necessarily Satisfy The Requirement That The Matter Be "Conclusively Resolved."

Although the Sixth Circuit Court of Appeals found that the first *Cohen* factor is satisfied here, it does not follow that the imposition of monetary sanctions against an attorney in an ongoing case is necessarily an order which is "conclusively determined."[5]

"The 'conclusive determination' requirement means that appellate review *now* is likely needed to avoid that harm."

---

[5] Respondent has previously conceded that the subject order meets the first prong of *Cohen*. See *Brief of Respondent in Opposition to Petition for Writ of Certiorari* at 11. That concession is not intended to imply that the issue is so clear as characterized by the Sixth Circuit, nor does it mean that every sanctions order would meet the first prong of the test.

Behrens, 516 U.S. at 315. Justice Rehnquist remarked in *Firestone Tire & Rubber Co. v. Risjord*:

> [I]t is not at all clear to me, nor has it been to the courts considering the question, that an order denying a motion for disqualification of counsel conclusively determines the disputed question. The District Court remains free to reconsider its decision at any time. . . . [T]he possibility of reconsideration by the trial judge cannot be dismissed as merely theoretical.

449 U.S. at 381 (citations omitted).

Petitioner moved the District Court to stay the collection of the sanctions pending by November 1, 1996, and the stay was subsequently granted by the District Court. *Jt App.* 6, Doc. 138.[6] "Sanctions imposed during the pendency of the case, but not made immediately payable, may well later be rescinded by the court." *Ortho Pharm. Corp. v. Sona Distrib.*, 847 F.2d 1512, 1515 (11th Cir. 1988). Petitioner's sanctions have yet to be paid and, as a practical matter, might never have been paid had this appeal not been filed. The case could have settled and the sanctions rescinded by the Court as part of the settlement agreement. Even after a verdict, the District Court could have revoked "the sanction in order to secure a settlement of the litigation. The kind of speculation on future harm the parties offer here is of precisely the kind the Supreme Court rejected in *Firestone*." 796 F.2d at 573.

---

6 An ironic example of the perhaps petty disruption of the underlying litigation centers around this document, which cannot be located by the District Court or Circuit Court, although it is reflected in the docket. The Record before this Court may not be complete, or the records in the three appellate cases or the district court record may also be incomplete.

The court could change its mind based upon any number of factors unique to a given case.

B. An Order Imposing Monetary Sanctions Against An Attorney For Pretrial Misconduct Does Not Resolve An Important Issue Completely Separate From The Merits Of The Action.

The decision to impose sanctions against an attorney for discovery violations under Fed. R. Civ. P. 37 is entwined with the merits of the underlying case, and cannot be effectively separated from the merits. Further, the imposition of sanctions against an attorney under Fed. R. Civ. P. 37 is not the type of "important" issue which requires an immediate appellate review.

The second prong of the *Cohen* collateral doctrine rule as set forth in *Coopers & Lybrand v. Livesay*, is that the interlocutory order must "resolve an important issue completely separate from the merits of the action." 437 U.S. at 468.

This Court has focused on two aspects of the "separability" prong of the *Cohen* doctrine. First, to qualify for an immediate interlocutory appeal, "the order must involve an 'important' right which would probably be irreparably lost, if review had to await final judgment." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502 (1989). The requirement of "importance" applies not only to the "separability" requirement, but must also be read in conjunction with the third *Cohen* requirement, the determination if the right is effectively reviewable. *Digital Equip. Corp.*, 511 U.S. at 878.

The second part of the "separability" test is the determination of whether the order involves considerations that are "enmeshed in factual and legal issues compromising the plaintiff's cause of action." *Coopers & Lybrand*, 437 U.S. at 469.

1. The Petitioner Has Not Identified an Important Interest Which Justifies an Immediate Appeal.

This Court has identified as "sufficiently important" to justify an interlocutory appeal those interests that approach or touch upon fundamental rights of far more urgency than the interests of an attorney in a monetary sanction. The interest in avoiding imprisonment and excessive bail, *Stack v. Boyle*, 342 U.S. 1 (1952); double jeopardy, *Abney v. United States*, 431 U.S. 651 (1977); Speech or Debate, *Helstoski v. Meanor*, 442 U.S. 500 (1979); absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); qualified immunity of governmental officials, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); or Eleventh Amendment immunity of state governments and instrumentalities, *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); are the types of "important" rights, normally rising to a Constitutional level, which must be protected by an immediate appeal.

There are sound reasons for treating these rights differently from the rights of an attorney who is sanctioned for discovery misconduct. If the right Petitioner seeks to vindicate is the damage to her reputation caused by sanction, that right can be "just as effectively rehabilitated through an appeal from final judgment as through an interlocutory appeal." *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir. 1996).

If the concern is monetary, there is one obvious remedy - repayment. Alternatively, the court could stay the order pending final judgment, as happened here. The risk of non-repayment in the event or a reversal "does not, without more, constitute irreparable harm sufficient to qualify an order for immediate review." *Eastern Maico Distrib. Inc.*, 658 F.2d at 948.

If, as the Petitioner claims, this is an important right because of the financial hardship imposed on the Petitioner, then denial of sanctions should be appealable immediately as well. It places no less burden on innocent counsel and parties whose costs are multiplied by discovery abuses. Had the district court denied the requested sanctions, however, the appeal would no doubt have waited until the end of the case. *Cassidy v. Cassidy*, 950 F.2d 381, 383 (7th Cir. 1991). There is no justification for the position that an attorney who is sanctioned for "egregious" conduct during pretrial discovery has more "important" rights than an innocent party who has been required to suffer the burden of compelling discovery.

2. Appellate Review of the Sanctions Imposed Against Petitioner For "Egregious" Misonduct, during Pretrial Discovery Involves Considerations Enmeshed in the Merits.

The second part of the "separability" prong of the collateral order doctrine is a determination of whether the sanction is inextricably entwined with the merits of the underlying action. On this issue, the Sixth Circuit concluded "that the issues involved in Cunningham's appeal likely would not turn out to be completely separate from the merits of the underlying case." *Starcher*, 144 F.3d at 424.

The Sixth Circuit found that the underlying litigation involved a dispute over the response to interrogatories and the request for the production of documents. Because the Petitioner had provided responses to at least some of the Defendant's discovery requests:

> [P]resumably her challenge to the district court's Rule 37 order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of the many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits.

Id.

This Court has held that "considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals . . . to cases presenting more abstract issues of law." *Johnson*, 515 U.S. at 317. Unlike the usual questions involving immunity, discovery disputes will draw appellate courts into evidentiary determinations which differ only slightly from an inquiry into the merits. Similar to the resolution of a speedy trial claim, discovery disputes will "necessitate a careful assessment of the particular facts of the case . . . best considered only after the relevant facts have been developed at trial." *MacDonald*, 435 U.S. at 858.

One of the best examples of questions arising from attorney misconduct is found in *Richardson-Merrell Inc.*, which recognized that "appellate review of orders disqualifying counsel for misconduct may be entwined with

the merits of the litigation." 472 U.S. at 439. The Court concluded that orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal. *Id.*

Many courts of appeals which have addressed this issue have also recognized that sanctions imposed by a District Court judge under Rule 37 are inseparable from and collateral to the review of a case. In *Evanson*, the Temporary Emergency Court of Appeals was asked to review sanctions of $60,961.09 against a defendant for giving false responses to interrogatories. The court held that the sanctions were not separable or collateral, but instead were "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 619 F.2d at 74.

Likewise, the Third Circuit found it could not avoid reviewing the core facts in the case when examining a discovery sanction award. To consider whether documents requested by the defendants were relevant, the appellate court would have to consider the nature of the claims against each defendant and reach some conclusion as to the relative importance of the discoverable material, thereby failing to satisfy the second criteria of collateral order rule. *Eastern Maico Distrib., Inc.*, 658 F.2d at 947.

Had the Court of Appeals reached the merits of Petitioner's claims, it would have reviewed the district court order in context of the full factual record to determine if there was an abuse of discretion. *Regional Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988). As part of that review, the Court of Appeals would have been required to consider and rule on the following issues: prejudice to the sanctioned party's adversary; whether the sanctioned party was warned that failure to cooperate could

lead to an adverse judgment; whether less drastic sanctions were imposed or considered; and the degree of willfulness or culpability of the recalcitrant party. *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986 (6th Cir. 1988).

Any appellate review of the sanctions in this case will entangle the Court of Appeals in the merits. If the courts must review these issues, a single appeal, after final resolution of the case, with a complete record, will best serve the interests of judicial efficiency and justice.

Petitioner urges this Court to apply the holdings of *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) and *Willy v. Coastal Corporation*, 503 U.S. 131 (1992) to this case. Both, however, are distinguishable. In *Cooter & Gell*, the court held that Rule 11 sanctions may be imposed even after a voluntary dismissal pursuant to Rule 41(a) of the Rules of Civil Procedure. 496 U.S. at 408. On appeal, this Court held that nothing in the language of Rule 41(a)(1)(i), Rule 11 or any other federal statute or rule terminated the district court's authority to impose sanctions after dismissal. *Id.* at 395. The Rule 11 sanction did not require the district court's assessment of the legal merits of the complaint. *Id.* at 396. Instead, it was a determination of whether the attorney had abused the judicial process in a voluntarily dismissed case. *Id.* at 399. This is wholly different from a Rule 37 sanction, which is typically imposed while the case is still in progress, and which does require the District Court to consider the relative value of the discovery sought, or the surrounding circumstances of the case.

In *Willy v. Coastal Corp.*, the Court held that Rule 11 sanctions may be imposed even if the district court is later determined to have been without subject matter jurisdiction. 503 U.S. at 138. The Court recognized that courts have an

interest in the maintenance of orderly procedure, even in an action for which jurisdiction is later found lacking. *Id.* at 137. Even if the determination of Rule 11 sanctions after the resolution of the merits of the case are "collateral" to the merits of the underlying case, Rule 37 sanctions ordered during pendency still implicate the merits.

In the case before the Court the fee issue is not "collateral" to an order ending the litigation on the merits. Instead it was part of an order compelling discovery in an effort to move the litigation toward the ultimate conclusion. *Willy* and *Cooter & Gell* dealt with Rule 11 sanctions, which occurred after the determination of the litigation. Appellate courts upholding the appealability of Rule 11 sanctions have noted:

> [T]he sanctioned conduct here does not relate to discovery activity, which is typically related to the merits of the underlying litigation, but, rather, to the district court's perception, wholly collateral to the merits of the case, that appellant deliberately disobeyed an order granting leave to file an amended pleading.

Eavenson, Auchmuty & Greenwald v. Greenwald, 775 F.2d 535, 538 n.6 (3d Cir. 1985).

Cooter & Gell, and *Willy* cannot be applied logically to a Civil Rule 37 sanction order in a pending case.

C. The Imposition Of Monetary Sanctions During Pretrial Discovery Is Effectively Reviewable On Appeal From The Final Judgment.

The third prong of the *Cohen* doctrine is the requirement that an order must be effectively unreviewable on appeal from a final judgment. Perhaps the best examples are cases involving the right to a reasonable bail. Even if the appellate court were to conclude that the District Court erred in setting the bail, it could never restore the appellant's freedom. Likewise, in cases involving absolute or qualified immunity or immunity under the Eleventh Amendment, the appellate court could never restore the right not to be subjected to expense and vexation of trial.

Such cases each involve an absolute right, "the legal and practical value of which could be destroyed, if not vindicated before trial." *United States v. MacDonald* 435 U.S. 850, 860 (1978). By contrast, this Court has normally denied review of pretrial discovery orders. *United States v. Ryan*, 402 U.S. 530, 533 (1971). "[I]n the rare case when [an] appeal after final judgment will not cure an erroneous discovery order, the party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Alexander v. United States*, 201 U.S. 117 (1906); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

A pretrial sanctions order is not unlike the disqualification of counsel, for which this Court has consistently refused to allow an interlocutory appeal. See *Flanagan*, 465 U.S. at 270; *Firestone Tire & Rubber Co.*, 449 U.S. at 379; and *Richardson-Merrell Inc.*, 472 U.S. at 440. The Court has noted that even the important right to counsel can be best reviewed after final judgment. If so, monetary sanctions of $1,494.00 imposed against an attorney for "egregious" misconduct can also be reviewed effectively after the conclusion of the case, when all the facts been fully

developed and the relevancy of the requested discovery is established fully. The appellate review of the imposition of sanctions will be no different from review of an order denying sanctions.

One of the most frequently cited cases for the Petitioner's view is *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983), holding that sanctions are immediately appealable. However, the sanctions involved in *Cheng* were "attorneys' fees, costs and expenses against appellant's lawyer ... for petitions filed in the appellate courts." *Id.* at 888. The Second Circuit concluded "that on the 'unusual facts of this case' the district court order was appealable under *Cohen*." *Cheng*, 713 F.2d at 890. The decision has been subsequently criticized by a number of courts, including the Second Circuit itself in *Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997), where the court suggested that if it were writing on a clean slate, it would be tempted to limit *Cheng* to its unusual facts. Judge Timbers' dissent in *Cheng* has been found persuasive by a variety of courts holding that sanctions imposed against attorneys, pursuant to 28 U.S.C. § 1927, should properly be appealed at the end of the case. Judge Timbers noted:

> [I]f an attorney were required to take an interlocutory appeal in order to preserve his right to appeal from an order awarding fees every time a court imposes a § 1927 sanction, it is apparent that the purpose of Congress in reducing litigation delays by amending § 1927 to include reasonable attorneys' fees would be undermined by the very statute which sought to reduce unwarranted delays.

713 F.3d at 894. He concluded that the fee order was not effectively unreviewable on appeal. *Id.* at 895.

The better reasoned view, informed by the experiences following the errors made in *Cheng* is that the "[a]ppeal of the sanction is best heard after final judgment. If the judgment is appealed, it will be helpful to the appellate court to be able to review the order against the background of the case as whole. This is also more efficient and cost effective." *In Re Licht & Semonoff*, 796 F.2d at 572.

Immediate appeal of sanctions ordered under Rule 37 will not materially advance the ultimate termination of the litigation in that "[t]he validity of the discovery sanctions can be questioned, along with any other issues in this proceeding, following a final decision." *Evanson*, 619 F.2d at 74.

The Court of Appeals for the Federal Circuit, following the reasoning of the First, Third, Fifth and Tenth Circuits, held that sanctions against an attorney are reviewable after final judgment is entered, and that no harm would befall the sanctioned attorney by postponing the appeal of the sanction order until final judgment was entered. Even if there were no appeal on the merits, the attorney would be able to seek review of the sanction order after the action is ended. *Sanders Assoc. v. Summagraphics*, 2 F.3d 394, 398 (Fed. Cir. 1993).

The Third Circuit Court of Appeals addressed this issue in *Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik*, 658 F.3d 944, 948 (3d Cir. 1981):

> [L]ike the collateral order exception articulated in *Cohen*, a rule permitting appeals by non-parties must reflect a "practical" construction

> of Section 1291 in order not to create an intractable morass of appeals that would unnecessarily obstruct district court resolution of cases.

In *Eastern Maico*, the Court found that the orders were fully reviewable on appeal from the final judgment, and that the risk of non-recovery of the sanctions, if the amount was paid, did not constitute irreparable harm sufficient to qualify the order for immediate review. The Court further reasoned:

> No irreparable harm is suffered by the party if it must pay the expenses immediately and then await final adjudication of the claim. At least the harm is no less than what the opposing party would suffer it did not receive its expenses until after final judgment.

Id. The Third Circuit went on to observe that "[a]n attorney sanctioned for such conduct by and large suffers no inordinate injury from a deferral of appellate consideration of the sanction. *Id.* at 950.

The Seventh Circuit addressed the issue in *Cleveland Hair Clinic Inc. v. Puig*, 104 F.3d 123, 126 (7th Cir. 1997), holding that "[a] disgruntled attorney will be able to present the sanctions issue on appeal from the final decision, even if the sanctioned litigant chooses not to, because appeal at the end of the case brings up all interlocutory orders."

The Ninth Circuit rejected immediate sanction appeals in *Johnny Pflocks, Inc. v. The Firestone Tire & Rubber Co.*, 634 F.2d 1215 (9th Cir. 1980), a case involving $7,862.00 in

attorneys fees and costs, imposed as sanctions under Rule 37, for failure to provide complete answers to interrogatories.

> *Cohen*, clearly indicates that appeals may not be taken from orders that effectively may be reviewed and corrected if and when final judgment results. 337 U.S. at 546. Here the order requiring payment of costs and fees can be reviewed and corrected when final judgment is entered. There is no need for treating such an issue piece-meal.

Id. at 1216.

Likewise, the Tenth Circuit in *G.J.B. & Associates, Inc. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990), rejected any notion "that an attorney will lose the right to appeal if the parties settle or elect not to appeal from the final judgment," and held that "counsel must await the conclusion of the underlying lawsuit before appealing sanctions under § 1291." The Tenth Circuit saw "nothing to prohibit an attorney of record from appealing a sanction order when the main case concludes. Such an appeal is best heard after final judgment, since the Appellate Court will likely need to review the record as a whole to determine the propriety of sanctions." *Id.*

This is especially true where, as here, sanctions arise from a pretrial dispute over discovery. The Tenth Circuit was also concerned about the possibility of delay if an attorney could immediately appeal the imposition of sanctions:

> Indeed, it would be ironic to appeal from a sanction order, inevitably delaying lower court proceedings, when that order may have resulted from tactics that

> already unjustifiably delayed the proceedings. While we are aware that a sanction order may have some effect on the attorney-client, this possibility alone is not enough to make the order "effectively unreviewable" at a later time. An attorney's obligation is to serve the client's interests at all time ethically.

Id.

Although the Sixth Circuit below focused primarily on the second element of the *Cohen* test, it saw "no reason why, after final resolution of the underlying case, a sanctioned attorney should be unable to appeal the order imposing sanctions." *Starcher*, 144 F.3d at 425.

Because she was removed from the case, Petitioner argues that she should enjoy an immediate right of appeal which she would not have enjoyed without the disqualification. The distinction is meaningless. There is no rational basis for conferring greater rights on an attorney who is disqualified than upon one who is not. Both can await the outcome of the merits before appealing. For the same reasons which lead them to reject a blanket rule that all sanctions were appealable immediately under *Cohen*, the Tenth Circuit reasoned:

> We see no reason to create an exception to this general rule and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in *G.J.B. & Assoc.* We also see no

> reason to permit an immediate appeal under *Cohen* so that Mr. Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision.

Howard, 90 F.3d at 437.

The Sixth Circuit also reflected on some of the broader reasons for rejecting the distinction between participating and non-participating attorneys:

> Expanding the collateral order doctrine to cover cases like Cunningham's seems particularly unwise at a time when requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses. Creating a distinction between participating and non-participating attorneys could add another tactical arrow to the arsenal; litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case. For all these reasons, we decline to adopt a distinction between participating and non-participating attorneys for purposes of the collateral order doctrine.

Starcher, 144 F.3d at 425.

Finally, the Sixth Circuit noted the practical, administrative problems with a rule that hinged on the attorney's participation in the case. As it happened, Petitioner was disqualified on the same day the District Judge upheld the

sanction order, but she might as easily been disqualified or withdrawn months or years later. The courts would then be drawn into the debate as to when the "non-appealable" sanction had matured into an "appealable" order. The Sixth Circuit found the situation fraught with difficulty. *Id.* It was correct.

If this Court concludes that an attorney may properly appeal a sanction at the conclusion of the litigation, the only additional obligation imposed upon the non-participating attorney, will be the inconvenience of monitoring the case and effecting the appeal at the appropriate time. This administrative inconvenience should not be allowed to outweigh finality requirements of § 1291 and all of the disadvantages attendant to interlocutory appeals.

Petitioner makes a final argument that the circuit court should have asserted jurisdiction under Fed. R. App. P. (4)(a)(2). *Brief for Petitioner,* n.14. Fed. R. App. P. (4)(a)(2) provides that a notice of appeal filed after a court announces its decision, but before the entry of judgment, is treated as being filed on the date of and after the entry. Petitioner has not raised this point before, but Fed. R. App. P. (4)(a)(2) is designed to protect the party who appeals a decision, announced by the court, before the judgment entry is filed. *Firstier Mortgage Co. v. Investors Mortgage Co.*, 498 U.S. 269 (1991). It does not apply to this case.

Petitioner argues that the circuit court's decision gives her no right of appeal, at all. Unfortunately for Petitioner, she was very involved in the case, although not as counsel of record. She chose not to perfect her appeal when final judgment was rendered, knowing that the jurisdiction of the court of appeals over her original appeal was being challenged. Petitioner could easily have filed another notice

of appeal, and moved to consolidate all of the appeals pursuant to Fed. R. App. P. 3(b). She chose not to do so.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit be AFFIRMED.

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Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

This case calls on the Court to decide whether an attorney may appeal directly from a sanction order that is finally imposed prior to judgment. When the district court sanctioned Petitioner in the course of discovery, she immediately appealed. A divided panel of the Sixth Circuit dismissed the appeal for lack of jurisdiction, acknowledging that the great majority of circuits would reach the opposite result. This Court granted certiorari to resolve the conflict.

Petitioner contends that a sanction is final, and therefore appealable, when definitely entered. In this case, the district court entered a sanction of a definite amount in the middle of the case, so she appealed immediately. If the district court instead had deferred entering the sanction, Petitioner would have been obligated to defer her appeal as well. Alternatively, Petitioner contends that she was permitted to appeal immediately because, at the time of her appeal, she no longer was participating as counsel in the case.

Petitioner's view is most consistent with this Court's precedents and the policy considerations underlying the "*Cohen* doctrine." As Petitioner's opening brief explained, she is not a party to the final judgment. As such, she cannot appeal from the judgment but must instead appeal directly from the order that acts upon her. If an attorney such as Petitioner is not permitted to bring an immediate appeal, she will have no opportunity to contest the sanction at all.

In addition, the decision below will forbid an attorney from appealing until the end of a case even when a district court imposes a large monetary sanction in litigation that will not end for years. The attorney must bear both the financial burden and the serious professional stain of the sanction for a substantial time before receiving any opportunity for review. There is, moreover, no assurance

that the case ever will reach final judgment (whether through settlement or inattention) such that the attorney will have the opportunity to appeal.

In its brief on the merits, Respondent assumes that this Court must choose from two polar alternatives: permitting or forbidding *all* immediate appeals of attorney sanction orders. That is not correct, and the question is far more subtle. As noted above, Petitioner agrees with the Sixth Circuit and Respondent that many attorney sanctions are not immediately appealable. It is only when the district court finally enters the sanction during the pendency of the case – rather than awaiting the final judgment – that the attorney must appeal immediately or not at all. By permitting district courts to control whether an immediate appeal is available, Petitioner's approach appropriately balances the interest of district judges in controlling their proceedings and the interest of attorneys in securing review of orders that impose substantial and immediate burdens upon them.

ARGUMENT

I. The Sanction Imposed Upon Petitioner Satisfies the "*Cohen* Doctrine's" Three-Part Test Of Appealability.

A. The District Court's Order "Conclusively Resolved" Petitioner's Liability For Sanctions.

In a substantial change of position, Respondent (at 21-22) contends for the first time that the district court's order did not "conclusively resolve" Petitioner's liability for sanctions. Respondent previously had conceded this point in the Sixth Circuit and in its brief in opposition to certiorari. For its part, the Sixth Circuit found it "beyond dispute" that the district court's order in this case "conclusively resolved" the issue. App. 43. Even in this Court, it is not clear whether Respondent is contending that sanction orders *never* "conclusively resolve" the issue of sanctions (*see* Resp. Br. 6-7 (citing *In re Licht & Semonoff*, 796 F.2d 564, 570 (1st Cir. 1986), with approval)) or instead

that the specific order *in this case* did not "conclusively resolve" Petitioner's liability for sanctions (*see* Resp. Br. at 21-22). We therefore address both arguments in turn.

1. Sanction orders are "conclusive" under the *Cohen* doctrine. Respondent contends (at 6-7) that in the time between the entry of a sanction and the end of the case, "developments could result in the order's modification prior to final judgment on the merits. The court might rescind it, reduce it or increase it." But Respondent's position is foreclosed by the precedents discussed in our opening brief (at 13), which hold that an order is "conclusive" notwithstanding a district court's inherent authority to revise or amend it. It simply is insufficient to preclude an interlocutory appeal that, as Respondent puts it (at 23), "[t]he court could change its mind based upon any number of factors unique to a given case." Thus, Respondent's argument is correct "only in the technical sense that every order short of a final decree is subject to reopening at the discretion of the district judge," which is not relevant under the *Cohen* doctrine. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983); *see also Johnson v. Jones*, 515 US 304, 312 (1995) (applying this rationale to find orders denying qualified immunity "conclusive" despite the fact that they technically could be amended later); *Gulfstream Aerospace v. Mayacamas Corp.*, 485 US 271, 277 (1988) (explaining that this Court has "contrasted two kinds of nonfinal orders: those that are 'inherently tentative'" and therefore nonappealable "and those that, although technically amendable, are 'made with the expectation that they will be the final word on the subject addressed'" and therefore are deemed "conclusive" (citation omitted)).[1]

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[1] Respondent mistakenly relies (at 22) on then-Justice Rehnquist's concurring statement in *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368, 381 (1981), that "an order denying a motion for disqualification" is tentative. With due respect to the Chief

2. Respondent is wrong to contend that the specific order in this case did not "conclusively resolve" Petitioner's liability for sanctions. Respondent misconstrues the facts of this case when it contends that there was a realistic chance that the district court would alter the sanction against Petitioner. The magistrate judge determined that Petitioner must pay Respondent $1,494.00. App. 21. The magistrate furthermore expressly rejected Petitioner's request that the sanction be stayed, ordering that it be paid "forthwith." *Id.* 20-21. Petitioner then filed objections in the district court. *Id.* 5, docket no. 110. Petitioner furthermore sought a stay in the district court, explaining that Respondent already was seeking to collect the sanction immediately. *Id.*; Ct. App. J.A. 41, 474. The district court, however, refused to enter a stay and affirmed the magistrate's order. App. 23-24.

Petitioner subsequently appealed the sanction to the Sixth Circuit. App. 6, docket no. 134. Upon filing the appeal, Petitioner moved in the district court for a "stay pending appeal." *Id.*, docket no. 133; Petr's Motion To Stay Collection of Sanctions Pending Appeal at 1-2 (requesting "an order staying collection of sanctions" because Petitioner, "feeling aggrieved by the [sanctions] order, has appealed to the Sixth Circuit Court of Appeals from the Order"). The district court, having previously denied Petitioner's earlier motions for a stay, granted this request for a stay pending appeal. *Id.*, docket no. 138.

Justice's views, a majority of the Court disagreed. *Id.* at 375-76 (Opinion of the Court) ("An order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively [determines] the disputed question,' because the only issue is whether the challenged counsel will be permitted to continue his representation."). Moreover, even the Chief Justice's statement would, in the context of sanction orders, suggest only that a district court's *refusal* to award sanctions is tentative and nonappealable.

Respondent suggests that the district court left open the possibility that it would revise the sanction at a later date. But Respondent cannot cite any suggestion by either the magistrate judge or the district judge to that effect, and none exists. In particular, nothing in the district court's order granting a stay pending appeal suggests that the district court would ever revisit the sanction and, in point of fact, the district court never did so. The order therefore is final because there is "no basis to suppose that the District Judge contemplated any reconsideration of his decision." *Moses H. Cone Mem. Hosp.*, *supra*, 460 US at 12-13.

3. Respondent is wrong to rely on the stay of collection entered by the district court after Petitioner filed her appeal. Respondent makes the related argument that the order in this case did not "conclusively resolve" Petitioner's liability for sanctions because the district court entered a stay of collection pending appeal. Here, Respondent is wrong on both the facts and the law.

Respondent contends that the district judge "affirmed the sanctions by Order on October 22, 1996, but granted a stay pending final disposition" (Resp. Br. at 4) and, as a result, "[t]he case could have settled and the sanctions rescinded by the Court as part of the settlement agreement" (*id.* at 22).[2] Respondent misstates the facts. The district judge on October 22, 1996, did *not* enter a stay. To the contrary, Petitioner had requested a stay (App. 5, docket no. 110; Ct. App. J.A. 41, 474), but the district court refused to grant it. Instead, the district court on that date affirmed the magistrate's sanction order, including the requirement that Petitioner pay the sanction "forthwith." App. 23-24, 20-21.

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[2] As a separate matter, a settlement resolves the matter between the parties, not the attorneys. For the attorney to pursue a settlement that would resolve sanctions against herself would raise the real specter of a conflict of interest.

It was only in response to Petitioner's later motion for a stay pending appeal, which Petitioner filed after appealing to the Sixth Circuit, that the district court entered a stay. App. 5, docket no. 138. The district court's order expressly states that Petitioner's motion for a stay pending appeal is "granted." App. 6, docket no. 138. This is the process contemplated by FRAP 8, which provides that an appellant "must ordinarily move first in the district court . . . for a stay of the judgment or order of a district court." Such a stay, granted after the appeal already has been lodged, cannot deprive the district court's order of finality. The very purpose of a stay pending appeal is to permit the appeal to proceed without prejudice, not to preclude the appeal from occurring.

Respondent also is wrong as a matter of law to contend that a stay of collection renders a sanction order nonappealable. Because the relevant statute provides jurisdiction over all "final decisions" (28 USC 1291), Petitioner submits that an attorney sanction is appealable when finally entered. In this context, "finality" requires that the district court do two things: (i) definitely enter the sanction without regard for the final judgment; and (ii) definitely set a specific monetary amount to be paid. An immediate appeal therefore may be taken from a district court order directing an attorney to pay forthwith a specific monetary sanction. By contrast, no immediate appeal is permitted if the district court states that the sanction will be finally entered at the close of the case or will be merged into the final judgment, or the district court leaves the amount of the sanction to be determined later.

Contrary to Respondent's reference to collection of the sanction, the attorney's obligation to pay is relevant, but not determinative, of finality. Respondent thus has confused a stay of *collection* with a stay of *entry* of the sanction order. For example, if the district court provides that the attorney has sixty days to pay the sanction or that collection is stayed

pending the end of the case, the sanction nonetheless is final. As with all district court orders, under FRAP 4 a notice of appeal "must be filed with the district court clerk within 30 days after the judgment or order appealed from is *entered*" (emphasis added). A stay of collection does not fall within the class of orders that tolls the time to appeal under FRAP 4. *Browder v. Director, Dep't of Corr.*, 434 US 257, 264-65 (1978).

In this case, the district judge's sanction order was final and therefore immediately appealable. The sanction was entered definitely and without regard to the final judgment. In turn, the district court specifically affirmed both the magistrate's order that Petitioner pay the sanction "forthwith" and also the magistrate's determination that $1,494.00 was due. Although the district court stayed collection of the sanction after Petitioner appealed, the district court did *not* stay the entry of the sanction order itself. Moreover, as noted above, the district court gave absolutely no indication that it would revisit either the entry of the sanction or the amount that Petitioner must pay.

B. The Sanction Order Resolved An "Important Question" Distinct From The Merits.

1. Petitioner's appeal raises an "important question" under the *Cohen* doctrine. Respondent contends (at 24) that an attorney sanction order is not sufficiently "important" to satisfy the *Cohen* doctrine because, on Respondent's reading, this Court's precedents limit interlocutory appeals to questions of "a Constitutional level." But Respondent's citations of this Court's decisions are highly selective. No decision of this Court states that interlocutory appeals are limited to constitutional questions and many decisions permitting interlocutory appeals disprove Respondent's claim. *E.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 US 706 (1996) (interlocutory appeal of remand to state court under *Burford* abstention); *Moses H. Cone Mem. Hosp. v. Mercury*

Constr. Corp., 460 US 1 (1983) (stay of federal court litigation pending state suit); *Eisen v. Carlisle & Jacquelin*, 417 US 156 (1974) (allocation of costs of notice to class members); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (stay of case under *Pullman* abstention and refusal to convene a three-judge court); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 US 684 (1950) (vacating attachment of a vessel in admiralty); *Cohen v. Beneficial Indus. Loan Corp.*, 337 US 541 (1949) (refusal to compel plaintiffs to post a bond in a shareholder derivative action); *Railroad Trainmen v. Baltimore & O. R. Co.*, 331 US 519 (1947) (denial of intervention as a matter of right).[3]

In addition, attorney sanctions cannot be analogized to the facts of the only case in which this Court suggested that a question was not sufficiently "important" to permit an interlocutory appeal. In *Digital Equip. Corp. v. Desktop Direct*, 511 US 863 (1994), the defendant invoked a prior settlement agreement in an effort to dismiss the plaintiff's suit. The district court refused, and this Court held that no immediate appeal was permissible. 511 US at 884. The Court specifically concluded that the defendant's interest in an immediate appeal was not sufficiently "important" because (i) the defendant could appeal the refusal to dismiss at the end of the case (*id.* 881), and (ii) the defendant could institute a separate action against the plaintiff for the costs of defending the suit (*id.* at 882). As we explain below,

[3] Respondent specifically errs in relying on this Court's precedents permitting interlocutory appeals of qualified immunity rulings. Such appeals do not involve the abstract constitutional question of "qualified immunity," but instead address whether a particular legal proposition was "clearly established" at the time of the defendant's conduct. *Any* legal proposition that forms the basis for the plaintiff's cause of action – whether constitutional or statutory, and whether or not of great magnitude – may be raised in such an appeal.

neither of those considerations applies here. Petitioner cannot appeal at the end of the case and, even if she could, she has no recourse for the injury she suffers if the sanction remains outstanding until final judgment.[4]

2. The questions raised by Petitioner's appeal are "separate from the merits." Respondent's contention that attorney sanction orders are not sufficiently "separate from the merits" for purposes of the *Cohen* doctrine simply repeats the error of the majority below. This Court's precedents distinguish appeals that are intertwined with the *legal claims* of the underlying case, which may not be brought, from appeals that are intertwined with the *facts* of the underlying case, which may. *See generally* Petr's Open. Br. at 15-17. Thus, "the *Cohen* 'separability' component asks whether the question to be resolved on appeal is conceptually distinct from the merits of the plaintiff's claim. The appropriate comparison, then, is between the decision sought to be reviewed and *the claim underlying the action itself*." *Behrens v. Pelletier*, 516 US 299, 309 n.3 (1996) (emphasis added) (quotation marks and citation omitted).

This distinction is eminently sensible. When the appeal relates only to the facts of the underlying case, as opposed to the legal claims, "review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less

[4] Respondent also is wrong in its assertion of a slippery slope. BIO 23 ("If, as the Petitioner claims, this is an important right because of the financial hardship imposed on the Petitioner, then denial of sanctions should be appealable immediately as well.") We agree that a district court order refusing to impose a sanction raises an important question. But such an order does not satisfy the remaining *Cohen* requirements. In particular, the party who unsuccessfully seeks the sanction is a party to the final judgment and, accordingly, may bring such an appeal at the end of the case.

likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending)." *Johnson v. Jones*, 515 US 304, 311 (1995).

This Court specifically has rejected Respondent's contrary position in precedents addressing appeals of qualified immunity rulings, which Respondent ignores. The government defendants in those cases immediately appealed district court rulings that various legal propositions were "clearly established." This Court rejected the plaintiffs' contention that the "factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Mitchell v. Forsyth*, 472 US 511, 529 n.10 (1985). As *Johnson v. Jones* (*supra*, 515 US at 314) explains, an order that relates to the facts of the underlying case is immediately appealable if it "nonetheless raises a question that is significantly different from the questions underlying [the] plaintiff's claim on the merits." *Mitchell* (*supra*, 472 US at 528) specifically explains that the more narrow view of appealability now pressed by Respondent is foreclosed by precedents permitting immediate appeals "when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause."[5]

The sanction order in this case, and sanction orders generally, have nothing to do with "the claim underlying the

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[5] In arguing to the contrary, Respondent (at 26-27) invokes the conclusion of *Richardson-Merrell, Inc. v. Koller* (472 US 424, 439 (1985)) that "[a]ppellate review of orders disqualifying counsel for misconduct may be entwined with the merits of the litigation." But Respondent fails to note that the Court in *Mitchell* specifically *refused* to extend *Richardson-Merrell* to forbid appeals that involve the facts of the underlying case. 472 US at 529 n.10.

action" (*Behrens v. Pelletier*, *supra*, 516 US at 309 n.3) or "the merits of the plaintiff's claim" (*Mitchell v. Forsyth*, *supra*, 472 US at 529). Respondent does not contend otherwise. Thus, in this case, the plaintiff alleged that Respondent was liable for the suicide death of Casey Starcher because Respondent's agents failed to supervise Casey despite his known depression and history of suicide attempts. That claim does not bear on Petitioner's appeal, which relates instead to the process used by the magistrate in imposing sanctions, the amount of fees awarded to Respondent, and to Petitioner's justification for noticing the deposition of a witness on one date rather than another. *See* Petr's Open. Br. 5, 9-10.

Respondent furthermore proves Petitioner's point by invoking Sixth Circuit's standard for reviewing discovery sanctions. As Respondent explains, in reviewing Petitioner's appeal,

> the Court of Appeals would have been required to consider and rule on the following issues: prejudice to the sanctioned party's adversary; whether the sanctioned party was warned that failure to cooperate could lead to an adverse judgment; whether less drastic sanctions were imposed or considered; and the degree of willfulness or culpability of the recalcitrant party.

Resp. Br. 27-28 (quoting *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986 (6th Cir. 1988)). None of these inquiries relates to the merits of the plaintiff's claim against Respondent for the death of Casey Starcher.

Nor can Respondent persuasively distinguish two cases in which this Court squarely held that sanctions are collateral to the merits of the underlying litigation. *Willy v. Coastal Corp.*, 503 US 131 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 US 384 (1990); *see also* Petr's Open. Br. at 14 n.4 (collecting additional authorities). As Respondent explains (at 27-28), those decisions hold that sanctions may be awarded after the entry of judgment in the

underlying case. But the timing of the sanctions is irrelevant for present purposes. The Court's *rationale* in both cases was that sanctions are collateral to the merits of the underlying suit, and that rationale applies fully here. *See Willy*, *supra*, 503 US at 137 (sanctions are "collateral to the merits"); *Cooter & Gell*, *supra*, 496 US at 396 (a sanction order "requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate"); *accord* Resp. Br. 28 (in *Cooter & Gell*, "[t]he Rule 11 sanction did not require the district court's assessment of the legal merits of the complaint").

C. The Sanction Order Was "Effectively Unreviewable" On Appeal From The Final Judgment.

1. Attorneys may not appeal from the final judgment. Petitioner devoted the single largest section of her opening brief (at 17-28) to explaining why, under this Court's precedents, she is not a party to the underlying suit with a right to appeal from the final judgment. Thus, Petitioner carefully addressed this Court's decisions establishing that (i) only parties may appeal a final judgment (at 17-19 (citing fifteen decisions)); (ii) nonparties may only appeal orders punishing them directly (at 20-24 (citing seven decisions)) and (iii) attorneys are nonparties for purposes of the right to appeal (at 24-25 (citing three decisions)). In arguing that Petitioner can appeal the final judgment, Respondent does not address *a single one* of these precedents. Instead, Respondent sets out block quotations from those courts of appeals that, like the Sixth Circuit in this case, forbid interlocutory appeals.

We are at a loss for how to reply. We acknowledge that several courts of appeals have held that an attorney may contest a sanction by bringing an appeal from the final

judgment. Those holdings are wrong.[6] The quotations invoked by Respondent are no more persuasive than the contrary statements that Petitioner could set forth from other courts of appeals that disagree. After all, Respondent is defending the *minority* position in the circuits. In particular, the decisions quoted by Respondent do not contain any analysis of this question. Instead, each simply states that an appeal is permitted at the end of the case; none discusses the relevant precedents from this Court. The only possible exception is the acknowledgment of the majority below (App. 41-42) that, under *Alexander v. United States* (201 US 117 (1906)), a nonparty may incur a contempt sanction and thereby secure the right to immediately appeal a discovery order. But as Petitioner explained in her opening brief (at 21-22), *Alexander* is not limited to contempt citations and instead supports the conclusion that attorney sanctions are immediately appealable.

The only precedents that Respondent does discuss are inapposite. Respondent notes (at 30) this Court's holding that attorney disqualification orders are not immediately appealable. *Richardson-Merrell, Inc. v. Koller*, 472 US 424 (1985); *Flanagan v. United States*, 465 US 259 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368 (1981). But Respondent does not explain how the disqualification cases apply to these facts, and they do not. Unlike attorney

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[6] We specifically do not understand Respondent's lengthy exegesis on *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983) (holding that interlocutory appeals of attorney sanctions are permitted), and the subsequent treatment of that decision in the Second Circuit. *See generally* Resp. Br. at 31-32. Although one panel of the Second Circuit later criticized *Cheng* (*see Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir.). *cert. denied*, 118 S. Ct. 337 (1997)), the relevant point (if one exists) is that the Second Circuit has permitted interlocutory appeals of attorney sanctions in at least nine decisions (*see* Pet. 10 & n.4), never reaching a contrary result and never adopting a contrary rule *en banc*.

sanction orders, which must be appealed by the *attorney* (*see supra*), disqualification orders must be appealed by the *party* (*see Richardson-Merrell, Inc. v. Koller*, *supra*, 472 US at 434-35). Unlike the attorney, the party has a right to appeal from the final judgment, which led the Court to conclude that "the propriety of the trial court's disqualification order can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal." *Id.* at 438.

Even if an attorney were regarded as a party with a right to appeal the final judgment, a sanction would be "effectively unreviewable" in such an appeal. First, because most cases settle, it is not at all clear that a particular suit *ever* will result in an appealable final judgment. Second, the attorney suffers a substantial injury in the interim between the sanction order and any appeal from the final judgment. The attorney is rebuked publicly by the district judge for failing to abide by her duties as an officer of the court. It is not surprising, therefore, that Respondent repeats time and again that the order in this case describes Petitioner's conduct as supposedly "egregious." The stain of that rebuke remains with the attorney throughout her career unless overturned on appeal. The stigma of such a sanction can deter potential clients and eliminate other professional opportunities. In addition, the attorney can be made to pay a substantial fine (in the tens of thousands of dollars) out of pocket. It is not a sufficient remedy for the attorney to be required to appeal at the end of the case, which may not come for years in the future, and which lies outside the control of the attorney.

2. Nonparticipating attorneys, in particular, are not parties with a right to appeal from the final judgment. The Sixth Circuit's view that Petitioner is a "party" is particularly strained given that Petitioner was no longer serving as counsel at the time she filed her notice of appeal. Respondent contends (at 35) that "[t]here is no rational basis

for conferring greater rights on an attorney who is disqualified than upon one who is not. Both can await the outcome of the merits before appealing." But this argument, of course, begs the question. When an individual such as Petitioner appeals an order against her, and at the time of her appeal she does not represent any of the parties to the suit, she cannot seriously be described as a "party" to the action. The final judgment subsequently entered by the district court has no effect at all upon the attorney, and there is no basis to conclude that she has standing to appeal from it. As such, an interim sanction order is "effectively unreviewable" in an appeal from the judgment.

Moreover, there *are* important practical differences between an attorney who is participating in the case and one, such as Petitioner, who is not. A nonparticipating attorney has no control over, or interest in, the district court proceedings. Respondent's contention that an attorney sanction could be resolved through a subsequent settlement therefore lacks all force here. In point of fact, the underlying suit may reach final judgment without ever coming to the attention of the attorney, who would thereby lose her right to appeal. *See* FRAP 4 (notice of appeal must be filed within thirty days).

Nor are the practical concerns raised by the Sixth Circuit persuasive. Although the majority below wondered which event (sanction or removal from the case) should trigger the right to appeal (App. 47), the logical rule would be based upon whichever event occurs later. The majority below also believed that, if interlocutory appeals by nonparticipating attorneys were permitted, "litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case." *Id.* This scenario is far fetched and we have seen no evidence of it occurring in the several circuits that permit such appeals. It assumes that a party would move for sanctions, *prevail*, and then force

the opposing counsel out of the case. But parties with meritorious motions for sanctions presumably already bring them. In addition, it would be very odd for an attorney to appeal in an effort to recoup the amount of the sanction when, in order to do so, she must first withdraw from the case and thereby sacrifice her income from it.

II. An Immediate Appeal Is Consistent With The Policies Underlying The "Final Judgment" Rule.

1. Petitioner's proposal would result in only a limited number of appeals. Respondent's principal contention is that, by permitting an immediate appeal in this case, the Court would create an extraordinary burden on the courts of appeals and district courts. But Respondent's hypothesis cannot overcome the actual facts. As Petitioner explained in her opening brief, the rule that Petitioner endorses has been applied by several circuits for many years. Respondent chooses simply to ignore this data, which establishes that the courts of appeals have not experienced any of the burden Respondent predicts. *See* Petr's Open. Br. 29 (Second Circuit: eight appeals in fifteen years; Seventh Circuit: five appeals in fifteen years; Ninth Circuit: nine appeals in twenty years). The data is even more striking regarding Petitioner's alternative argument that an immediate appeal is permissible if the attorney no longer is participating in the case: only nine such appeals *ever* have been brought in the courts of appeals. *Id.* 30. Nor does Respondent contest the great value of these appeals, as more than two thirds result in decisions reversing the sanction in whole or part. *Id.* 30-31.[7]

[7] Petitioner agrees with Respondent that no logical "dollar threshold" exists at which appeals of sanction could be permitted. Resp. Br. 17. But this point *supports* a finding of appealability. Attorneys are unlikely to invest the effort and expense to appeal small sanctions. But on Respondent's view, attorneys are forbidden from directly appealing immediately executable sanctions in the tens of thousands of dollars, even when the underlying litigation may continue for years.

Respondent also is wrong to contend (at 16-17) that Petitioner's proposal would open the door to many other classes of appeals. The few examples that Respondent gives are distinguishable because they apply to a party and therefore merge into the final judgment. As such, they may be appealed at the end of the case. "[S]anctions imposed against the parties [and] jointly against the parties and counsel" (Resp. Br. 16) by definition act upon a party.[8] An order "foreclosing a defense or prohibiting the introduction of evidence" (*id.* 17) similarly applies to the party, not the attorney.[9]

[8] There is also a practical reason for distinguishing the appealability of orders sanctioning attorneys from those jointly sanctioning clients and their attorneys. Because joint sanctions may give rise to disputes between the client and attorney over who should pay the sanction, both should be participants in the appeal. Given that the party cannot take an interlocutory appeal, review of the sanction should await final judgment. In addition, when the sanction applies to the party, there is a much more realistic chance that it will be resolved through settlement.

[9] Respondent does not explain its remaining example, "an order requiring the offending attorney to travel to an inconvenient locale." Resp. Br. 17. Presumably, Respondent is imagining that a deposition or production of documents would occur at the locale (rather than the attorney being required to travel for the sake of traveling). But we could not formulate a set of facts on which the judge would direct a particular, named attorney (rather than simply a party's counsel) to conduct the deposition or document production. Ordinarily, a party has the right to decide who will represent her. The order Respondent imagines therefore would seem to operate upon the party, and therefore would be incorporated into the final judgment.

2. Petitioner's proposal would not interfere with district court and appellate proceedings. Respondent incorrectly assumes that a ruling in Petitioner's favor would render all attorney sanctions immediately appealable and thereby disrupt district court proceedings. In reality, under Petitioner's proposal, the district judge has it within her control to decide whether an immediate appeal is available. The judge can elect to enter the sanction finally at the end of the case, or to merge the sanction into the final judgment, thereby deferring the attorney's right to appeal. In those limited instances that the judge decides that an immediate sanction is required, the attorney should have the parallel right to contest the sanction.

But even when an interlocutory appeal is taken, no disruption results to the district court proceedings. Many immediate appeals result in stays of district court proceedings because the outcome on appeal will affect either the course of the litigation or the judgment on the merits. *E.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 US 424, 434 (1985) ("When an appellate court accepts jurisdiction of an order disqualifying counsel, the practical effect is to delay proceedings on the merits until the appeal is decided."). But that is not true when the issue on appeal is an attorney sanction, which is collateral to the underlying case and is unrelated to the judgment. As this case amply demonstrates, the underlying litigation continues through final judgment while the sanction is reviewed on appeal. *Accord* Resp. Br. 13 ("Petitioner appealed from two sanction awards, while the merits continued to run along a parallel track.").

Nor do appeals of attorney sanctions misuse appellate resources. Many interlocutory appeals are disfavored principally because the question on appeal may become "moot or irrelevant by the end of trial." *Stringfellow v. Concerned Neighbors in Action*, 480 US 370, 380 (1987). That is not so with attorney sanctions. As Petitioner

explained in her opening brief (at 17), and Respondent does not deny, "[t]he sanction order is imposed upon the attorney personally, and the calculus of the risks and benefits of appeal will not be changed by a decision on the merits." Nor is there any concern that an immediate appeal would "waste judicial resources by requiring repetitive appellate review of substantive questions in the case" (*Van Cauwenberghe v. Biard*, 486 US 517, 527-28 (1988)). As we explained above, sanction orders are collateral to the merits, and therefore the court of appeals will not face the same issue on an appeal of the final judgment.[10]

III. At The Very Least, The Sixth Circuit Should Have Permitted Petitioner's Appeal Under FRAP 4(a)(2).

Respondent presents no substantial response to Petitioner's argument that her notice of appeal was timely under the plain meaning of FRAP 4(a)(2). Although Respondent is correct (at 37) that Petitioner did not raise this argument below, Petitioner *could not* have done so. Petitioner filed her brief on appeal before the district court entered its final judgment and therefore could not request that the Sixth Circuit apply FRAP 4(a)(2).

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[10] Finally, Respondent is wrong to rely on the other mechanisms that exist for taking an interlocutory appeal, such as certification under 28 USC 1292, writs of mandamus, and partial final judgments under FRCP 54(b). None of those mechanisms have anything to do with attorney sanction orders. In point of fact, so far as our research reveals, *none* of them ever has been held to permit an appeal from an attorney sanction. Certification under section 1292(b) applies only to appeals that "may materially advance the ultimate termination of the litigation." Writs of mandamus are used "only in extraordinary situations," and traditionally "only to confine an inferior court to a lawful exercise of its jurisdiction." *Kerr v. United States District Court*, 426 US 394, 402 (1976); *Will v. United States*, 389 US 90, 95 (1967). And, FRCP 54(b) applies only to "claim[s] for relief . . . presented in an action."

Respondent does not deny that, as was the case in *Firstier Mortgage Co. v. Investors Mortgage Co.* (498 US 269 (1991)), Petitioner's "confusion [was] understandable" and that "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits of [Petitioner's] appeal." In fact, Respondent contends only that Rule 4(a)(2) is "designed to protect the party who appeals a decision, announced by the court, before the judgment entry [*sic*] is filed." Resp. Br. 37. But that is precisely what occurred in this case. When the district court entered its sanction order, Petitioner appealed. The district court subsequently entered its final judgment while Petitioner's appeal was still pending in the Sixth Circuit. In the words of the rule, because Petitioner's "notice of appeal [was] filed after the court announce[d] a decision or order–but before the entry of the judgment or order–[her appeal] is treated as filed on the date of and after the entry."

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit in this case be reversed.

Respectfully submitted,

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